IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-715

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner,

vs.

JESSE RODRIGUEZ, SADRACH G. PEREZ and MODESTO HERRERA,
on Their Own Behalf and on Behalf of Those Similarly Situated,
Respondents,

and

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner,

vs.

ERNEST HERRERA, TRINE PRIBE and MARIO MELCHOR,
Respondents,

and

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner,

vs.

PATRICK RESENDIS, TONY ESCOBEDO, WILBURN WHITE,
ARTURO RODRIGUEZ and ELIAS GONZALEZ,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

L. N. D. WELLS, JR.
G. WILLIAM BAAB
Suite 200—8204 Elmbrook Drive
Dallas, Texas 75247

DAVID PREVIANT
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Counsel for Petitioner, Southern
Conference of Teamsters

Of Counsel:

MULLINAX, WELLS, MAUZY & BAAB, INC.
Suite 200—8204 Elmbrook Drive
Dallas, Texas 75247

GOLDBERG, PREVIANT & UELMEN
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Index to Appendix

Cases Cited

Statutes

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. .....

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner,

vs.

JESSE RODRIGUEZ, SADRACH G. PEREZ and MODESTO HERRERA,
on Their Own Behalf and on Behalf of Those Similarly Situated,
Respondents,

and

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner,

vs.

ERNEST HERRERA, TRINE PRIBE and MARIO MELCHOR,
Respondents,

and

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner,

vs.

PATRICK RESENDIS, TONY ESCOBEDO, WILBURN WHITE,
ARTURO RODRIGUEZ and ELIAS GONZALEZ,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

Petitioner, Southern Conference of Teamsters, (hereinafter "Southern Conference"), respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above related

and consolidated cases on November 25, 1974 (Petitions for Rehearing denied upon August 18, 1975).

The facts of these cases and the questions presented here are, in important respects, substantially similar and related to those presented in *International Brotherhood of Teamsters v. United States of America* (Application pending, No. 75-636, October Term 1975).

OPINIONS BELOW

The opinions of the Court of Appeals in the cases at bar are reported, respectively, at 505 F.2d 40 (*Rodriquez*), 505 F.2d 66 (*Herrera*) and 505 F.2d 69 (*Resendis*). The opinions are reproduced in the Appendix hereto (App. pp. A-13-67, 74-78, 87-94).[1]

The Trial Court's respective Findings of Fact and Conclusions of Law and judgments, all dated March 22nd, 1973, in these cases which were tried *seriatim* in San Antonio, Texas, are reproduced in the Appendix beginning at (App. pp. A-1-12, 68-73, 79-86).

JURISDICTION

The respective judgments of the Court of Appeals herein were entered upon November 25, 1974. (App. pp. A-95-100). As noted, the Southern Conference and employer Appellees (East Texas Motor Freight, Yellow Freight System, Inc. and Leeway Motor Freight, Inc.) filed Petitions for Rehearing which were denied by order entered August 18, 1975. (App., pp. A-101-06). This Petition for Certiorari is filed 90 days within the latter date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

---

[1] The Appendix hereto is presented in an appended volume, designated "App.".

QUESTIONS PRESENTED

1

Does the mere existence of a statistical imbalance in racial composition of employees in a particular job classification justify a court's disregard of the legal standard for proof of an individual claim of discrimination, as defined by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and the Sixth Circuit in *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974)?

2

Where a finding of discrimination by an employer in original employment is a necessary pre-requisite to a finding of violation of Title VII and 42 U.S.C. § 1981, may an appellate court "accord no weight" to an evidentiary stipulation between all parties at trial that alleged discriminatees were not discriminated against in their original employment?

3

Does a union violate Title VII of the Civil Rights Act of 1964, as amended,[2] and 42 U.S.C. § 1981, solely by the establishment and continuation of a seniority system which provides job seniority from date of entry into the bargaining unit, where the union proposes seniority from the date of discrimination for employees who have been discriminatorily excluded from the bargaining unit by the employer?

---

[2] 42 U.S.C. §§ 2000e, *et seq.*

4

Does a union violate Title VII and 42 U.S.C. Section 1981 by negotiating a seniority system, neutral in its origin and on its face, which supposedly "locks-in" employees to city motor carrier jobs, where in fact the parties have stipulated at trial that the employees claim that their employer has refused to consider their request to transfer, and the seniority system thus has no effect in excluding such employees from "road" motor carrier jobs?

STATUTORY PROVISIONS

Section 703, (a) through (j) (42 U.S.C. § 2000e-2 (a)-(j), of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 1981 are reproduced in the Appendix (App. pp. 107-110).

STATEMENT OF THE CASE

A

Nature of the Cases

The cases at bar, characterized by the Fifth Circuit as "carbon copies," were all brought as private actions under Section 706 of Title VII of the Civil Rights Act of 1964, as amended.

Although these cases are private actions, we have previously said that they raise questions substantially related to those presented in *International Brotherhood of Teamsters v. United States of America* (No. 75-636, October Term 1975). The fil-

ing of these related petitions, along with that to be filed in *International Brotherhood of Teamsters v. Oliver I. Sabala, et al.*, 516 F.2d 1251 (5th Cir. 1974), reflects upon the serious and recurring nature of the questions for which review is sought.

In each case, with exceptions not relevant here,[3] plaintiffs who were "city" motor freight employees for their various employers contended that they had been discriminatorily denied "road" motor freight jobs by their employers, and also variously complained of "no transfer" practices by the employer and the seniority systems in effect at their terminals pursuant to collective bargaining agreements.

At trial, plaintiffs entered into stipulations which narrowed their claims as against the employers and unions involved and substantially reflected upon evidentiary considerations. Thus, in the *Resendis* and *Herrera* cases, plaintiffs stipulated that their claims of discrimination were "based upon the fact that after their original employment they had been 'locked-in' to the lower paying job of city driver and denied a job as a line (road) driver because of (a) The maintenance of separate seniority rosters for city and line drivers; (b) The fact that any city driver regardless of his race, if he transfers from city driver classification to road driver classification loses his accumulated city driver seniority; (c) Prior to the filing of the EEOC charges by the Plaintiffs in this lawsuit, the availability of line driving jobs was not made known to these Plaintiffs; (d) The Defendants discouraged and ignored inquiries from the Plaintiffs concerning the qualifications and/or availability of line driving jobs." Similar stipulations were made in *Rodriguez*.

---

[3] In *Resendis v. Leeway Motor Freight, Inc., et al.*, Arturo Rodriguez alleged that he had been discriminatorily fired as a "road" motor freight employee in 1972 and Wilburn White (a black) contended that he had been discriminatorily denied hire as a "city" employee since 1967. The Fifth Circuit affirmed the trial court's denial of both claims.

In *Resendis* and *Herrera*, the plaintiffs further stipulated that "plaintiffs were not discriminated against as defined by Title VII of the Civil Rights Act of 1964 insofar as their original employment with (the employer) is concerned." Again, an almost identical stipulation was made in *Rodriguez*.[4]

As noted by the Fifth Circuit herein, and as reflected by the undisputed record evidence as well, the responsibility for hiring plaintiffs and initial assignment of job classifications rested solely with their respective employers. Similarly, the union entities involved (Southern Conference and Teamsters Local 657) had nothing to do with the institution and application of the "no-transfer" policies, absolutely prohibiting transfer between city and road job classifications, applied to plaintiffs at various times by the employers here involved.[5]

Thus, the plaintiffs' claims and the Fifth Circuit's opinions herein were restricted, as to the union entities involved, solely to consideration of a theory of "lock-in" discrimination by the contractually-created seniority system governing job bidding and lay-off rights of road and city motor freight employees. (App. pp. A-54-57, 77, 93).

---

[4] The stipulation in *Rodriguez* was:

MR. WEISS: "The parties stipulate that the plaintiffs were employed at the San Antonio Terminal of East Texas Motor Freight without regard to race, color or national origin.

THE COURT: That means, Mr. Weiss, the original employment?

MR. WEISS: Yes, that's right, your Honor. Yes, sir, that's right, Your Honor."

[5] Employer Leeway Motor Freight, Inc. abandoned its "no-transfer" policy in 1971. (App. p. A-92).

B

Undisputed Facts as to the Seniority System

Plaintiffs were, at all relevant times, city motor freight employees of their respective employers, located at terminals in San Antonio, Texas. At the time of the "original hire" of each plaintiff by his respective employer, the employers had had no road operations or terminals in San Antonio, and employed no road motor freight employees there. As we have noted, plaintiffs thus uniformly (and accurately) stipulated that they were not discriminated against in their original employment as city employees at their employers' San Antonio terminals.

The terms and conditions of employment, including wages, hours and seniority rights for city and road motor freight employees of the respective employers here involved are set out in various and separate collective bargaining agreements which cover, respectively, city employees on the one hand and road employees on the other. There are separate road and city agreements between each individual employer and autonomous local unions affiliated with the International Brotherhood of Teamsters for each location at which an individual employer has road and/or city operations. These separate contracts, covering respectively road on the one hand and city employees on the other, have developed for wholly non-discriminatory reasons.

Under the afore-mentioned collective bargaining agreements, city motor freight employees are those performing the various functions necessary to operation of a local pick-up and delivery freight service (local drivers, dockmen, checkers, etc.). Road employees, are exclusively long-haul drivers. Under the contracts which define their terms and conditions of employment, city employees are all paid the same hourly wage, slightly higher than that paid to road employees. Fringe benefits for the two groups of employees (city and road) are identical. City em-

ployees have a weekly guarantee of 40 hours, with time and a half and in some instances double time for hours per week over that figure. Road employees have no weekly guarantee and do not receive premium pay for overtime work. Despite the absence of a weekly hour guarantee, many road employees nevertheless have an opportunity to earn a larger annual salary than that paid to city employees by working longer hours (up to seventy [70] hours per week). At the same time, of course, road employees must bear many of their own living expenses incurred out of town, work longer hours and are away from their homes and families for many days at a time. Thus, while road employment generally affords employees the opportunity for higher earnings, many employees choose and prefer to do city work. In no sense is there a "line of progression" from city to road jobs, nor can city jobs (affording an average yearly earning of more than $13,000) be characterized as "low-paying" or "menial."[6]

The seniority rules at issue,[7] negotiated into contract supplements following negotiation of a "Master Agreement" applicable nationwide[8] provide for separate job bidding and lay-off seniority for city motor freight employees and road motor freight employees of the respective employers.

Historically, both because of patterns of organization of motor freight employees and because of decisions rendered by the National Labor Relations Board, there have existed separate collective bargaining units for road motor freight employees on the one hand and city motor freight employees on the other. One of the results of this historical pattern of separate collective bar-

---

[6] See discussion p. 19 *infra*.

[7] The seniority rules involved here are identical to those in *International Brotherhood of Teamsters v. United States of America* (No. 75-636, October Term 1975).

[8] The National Master Freight Agreement.

gaining units has been the development of separate collective bargaining agreements covering city employees on the one hand and road employees on the other. These agreements, like those in the instant case, have provided for job bidding and lay-off seniority for all employees within the particular road or city bargaining unit beginning with the date of entry of the particular employee into that bargaining unit. Employees in both the city and road job classifications have historically and continuously preferred this separation of road and city job bidding and lay-off seniority.

The seniority system requires that, when an employer permits an employee to transfer between the road and city job classifications, the employee maintains his company seniority for fringe benefit purposes but assumes job bidding and lay-off seniority in his new job only from the date of employment therein. The uncontradicted evidence at trial was that the foregoing seniority rules "apply to all job applicants and employees (in the respective job classifications) regardless of race or qualifications." (App. pp. A-4, 70, 82). Thus, any city employee, whether Anglo, Mexican-American or Black,[9] upon moving to a road job is required to give up his city job bidding and lay-off seniority and assume road job bidding and lay-off seniority only from the date of entry into the road bargaining unit and job classification.

The foregoing seniority system, including the rules governing job bidding and lay-off seniority, has never been used by union entities to deny to individuals discriminatorily denied employment in the road (or for that matter the city job classifications) job bidding and lay-off seniority from the date they would have been employed in such a classification "but for" unlawful discrimination against them. To the contrary, union entities and particularly those involved here have consistently insisted upon

---

[9] Again, city employment is good employment, and, unlike other instances in other industries, this unit is not limited to minorities.

application of a "rightful place" seniority concept to those individuals who allege and prove discriminatory denial of employment in, *inter alia*, the road motor freight employee classification.

C

The Trial Court's Decisions

Based upon the trial stipulations and the above-recited evidence, and in conformance with the rules subsequently enunciated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the trial court dismissed plaintiffs' claims concerning the contract seniority system, holding that it violated neither Title VII nor 42 U.S.C. 1981. (App. pp. A-12, 73, 86). Denying plaintiffs' application for a class action in *Rodriguez*, the trial court treated all three cases as identical and found:

> (a) "It is stipulated that none of the plaintiff employees were discriminated against as to their original employment;"
>
> (b) "The named plaintiffs had not properly applied for road jobs and were in any event not qualified therefor;"
>
> (c) "The existence of separate contracts and separate job bidding and lay-off seniority for city and road drivers was reasonable 'as an accepted business practice and by the fact the National Labor Relations Board recognizes the two job groups as separate bargaining units';"
>
> (d) Contract provisions providing for separate job bidding and lay-off seniority for city and road drivers "applied to all job applicants and employees regardless of race or qualifications, and are not in any way discriminatory;"
>
> (e) As a matter of law union defendants had not "violated Title 42, United States Code, Section 2000e-5 or any section of Title 42 relating to race discrimination." (App. pp. A-12, 73, 86).

D

The Court of Appeals' Opinions

In reversing the trial court, the United States Court of Appeals for the Fifth Circuit used the vehicle of "class action" considerations and an overall statistical showing wholly to obscure and thus to nullify the trial court's findings that individual plaintiffs had failed to prove their claims of discrimination.

Concluding summarily that *Rodriguez* was a proper class action under Rule 23,[10] and reversing the trial court's holding to the contrary, the Court concluded that statistics reflecting a disparity between Anglos on the one hand and Blacks and Mexican-Americans on the other in East Texas Motor Freight's Texas road driving force "established a prima facie case of past discrimination in hiring" which had affected plaintiffs. The Court applied similar logic, based on overall statistical evidence, to the *Herrera* and *Resendis* cases, to conclude that plaintiffs there had been discriminated against *even though these latter actions were not brought as class actions.*

In all three cases, the Court declined to apply the standard established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 at 802 (1973), requiring that a complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination by showing that he (i) made proper application and (ii) was qualified for a job in which (iii) a vacancy existed. The Fifth Circuit also rejected, for purposes of determining seniority relief, the Sixth Circuit's adoption of a formula requiring actual application for road employment (or a filing of a charge with the Equal Employment Opportunity Commission), along with the existence of a vacancy and possession of qualifications to be a road driver as a basis for awarding seniority relief. See

---

[10] We defer to East Texas Motor Freight's petition, seeking review in *Rodriguez*, as to presentation of argument concerning "class action" considerations.

Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974). Thus, the trial court's undisputed findings that plaintiffs (a) had sought employment only in San Antonio, where no road jobs existed; (b) had not made proper applications for road jobs and (c) were in any event not qualified for road employment were completely disregarded upon appeal.

Similarly, the Fifth Circuit made short shrift of plaintiffs' stipulations, in conformance with the afore-cited findings of the trial court, that they "were not discriminated against in original employment" when they were hired in San Antonio as city drivers. Wrote the Fifth Circuit: "We accord no weight to the stipulation that the named plaintiffs were not discriminated against when they were hired at the San Antonio terminal as city drivers," contending that the stipulation did not foreclose simultaneous discrimination against plaintiffs in "their inability to gain a road driver job." (App. p. A-44).

Having thus concluded that plaintiffs in all three cases (and apparently, the entire Texas-wide class in *Rodriguez* as well) have been discriminatorily denied road jobs in original hire, the Fifth Circuit then concluded that the contract seniority system, requiring that city drivers give up their city job bidding and lay-off seniority upon transfer to the road, effectively discouraged the transfer of city drivers to road positions and thus discriminatorily "locked-in" minority city drivers to their lower paying jobs. (App. p. A-47). Because union defendants[11] had participated in negotiations which resulted in the contract seniority system and because they had not provided for "seniority carryover . . . on a one-time-only basis for qualified minority city drivers who wished to transfer to the road," Southern Conference and Local 657 were held to have violated and thus liable under 42 U.S.C. §2000e-2 and 42 U.S.C. §1981. (App. p. 57).

---

[11] In *Herrera* and *Resendis* the International Brotherhood of Teamsters was found not to have violated Title VII, or 42 U.S.C. § 1981. See App. pp. A-77, 92. The International was not a party in *Rodriguez*.

REASONS FOR GRANTING THE WRIT

This Petition, like that in *International Brotherhood of Teamsters v. United States of America*, No. 75-636 (October Term 1975), presents questions of extraordinary importance. In the cases in which we seek review, the Fifth Circuit has summarily disregarded a landmark decision of this Court while writing opinions which are in irreconcilable conflict with the law in the Sixth Circuit; swept aside rules of evidence; and effectively nullified Section 3 of Title VII, which purports to recognize the legality of "bona fide seniority system(s)." In short, there exists compelling reason for granting this Writ.

I

The Fifth Circuit's Decisions Are in Substantial Conflict With Those of This Court and the Sixth Circuit.

We have noted that in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) the Court stated in the most precise language the proof required of a plaintiff in an individual Title VII case to make a prima facie showing of racial discrimination: that he made proper application and was qualified for a job in which a vacancy existed. Thus, in *McDonnell Douglas*, once an individual minority applicant proved that upon proper application, the existence of a job vacancy and undisputed qualifications, "(the employer) sought mechanics, respondent's trade, and continued to do so after respondent's rejection," a prima facie case of discrimination was made out. (*Ibid.*) But then, and only then, did the burden "shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." (*Ibid.*) While the Court recognized that "the facts necessarily will vary in Title VII cases and the specification of the above prima facie proof required from (the employer) is not necessarily applicable in every respect to differing factual situations,"

the Court did not suggest such a departure could be justified in simple cases involving individual claims of discrimination.

Herrera and *Resendis* are precisely such cases. The trial court there found that plaintiffs had made not one iota of proof in compliance with the *McDonnell Douglas* standards. On appeal, plaintiffs did not argue, and indeed did not even suggest that the trial court's factual findings in that regard were "clearly erroneous."[12] Absent a showing that the findings were "clearly erroneous," there is absolutely no basis for the Fifth Circuit's disregarding them.

What the Fifth Circuit did, as we have said above, is: (1) reclassify *Rodriguez* as a class action; (2) look to the racial composition of East Texas' road drivers; and (3) then use evidence as to supposed discrimination against the class by East Texas to dispose of the individual claims by different plaintiffs against different employers (Lee Way and Yellow Freight) in *Herrera* and *Resendis*.

The propriety, and indeed the logic in this exercise is nonexistent. Can such a callous disregard of the rules laid out in *McDonnell Douglas* and the uncontested evidentiary findings of the trial court in *Herrera* and *Resendis* be justified? This is, we submit, "one of those rare instances where to state the question is in effect to answer it." *Goesaert v. Cleary*, 335 U.S. 464, 465 (1948).

Equally inexplicable is the Fifth Circuit's rejection of an important aspect of the holding in *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974). In *Thornton*, a class action, the Sixth Circuit nevertheless required that individuals prove both actual application for (or filing of an E.E.O.C.

---

[12] See Rule 52(a), Federal Rules of Civil Procedure; *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), reh. den. 333 U.S. 869 (1948).

charge) and wrongful denial of road employment as a prerequisite to an award of relief. In this respect, *Thornton* clearly applies *McDonnell Douglas* standards to a class action. But in *Rodriguez*, a case involving the same employer and identical contracts, the Fifth Circuit says that city employees have been discriminated against, and thus may transfer to road jobs taking their full city seniority with them, *not* based on any showing of whether the individual would have had a road job but for discrimination—but rather upon "whether he desires to transfer now." *Thornton* and *Rodriguez* are in irreconciliable conflict.

II

The Fifth Circuit's Refusal to Honor the Parties' Evidentiary Stipulation at Trial.

Fully as extraordinary as its refusal to follow *McDonnell Douglas* was the Fifth Circuit's determination that it would "accord no weight" to the parties' trial stipulations that plaintiffs had not been discriminated against in their original employment as city drivers. The Fifth Circuit's reason for doing so is obvious: a finding of discrimination against plaintiffs in their original employment as city drivers was absolutely necessary to a finding of lock-in discrimination. If plaintiffs were not discriminatorily placed in the city driver classification at the time of their hire, then seniority rules which applied equally to *all* city drivers, regardless of race, could not discriminatorily lock them in. This the Fifth Circuit acknowledged. (App. pp. A-42, 47).

The stipulations, as we have seen, matched precisely the evidence presented at trial. The three defendant employers had no road driver jobs in San Antonio when plaintiffs were originally hired there. Plaintiffs did not seek and were not denied road jobs at the time they were hired as city drivers. The Fifth

Circuit's refusal to honor this stipulation is simply the other side of the coin of its refusal to follow *McDonnell Douglas Corp.*

"The general rule is that stipulations entered into freely and fairly are not to be set aside except to avoid manifest injustice." *Fairway Construction Co. v. Allstate Modernization*, 495 F.2d 1077 (6th Cir. 1974).[13] Where the stipulation merely matched the record evidence, the "injustice" in enforcing such a stipulation could scarcely be deemed "manifest." Or, as the Fifth Circuit itself stated in *Rodriguez* concerning defendants' stipulation to hiring statistics, "having stipulated to the statistics, the defendants cannot, of course, dispute them." (App. p. A-44).

The Fifth Circuit's focus on class-wide statistics as to road drivers in *Rodriguez* was its only means of avoiding the parties' stipulation and the matching record evidence that all of the plaintiffs in all three cases were not discriminatorily denied road jobs at their original hire. The eleventh hour resurrection of *Rodriguez* as a class action can only be viewed in that light.[14]

III

Legality of Contract Seniority Rules.

"Seniority has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." *Humphrey v. Moore*, 375 U.S. 335 at 346-47 (1964). That is true in the cases at bar as to both city and road employees. The seniority rules at issue here affect hundreds of thousands of employees in the freight industry. And

---

[13] Citing *Sherman v. United States*, 462 F.2d 577 (5th Cir. 1972); *Fenix v. Finch*, 436 F.2d 831 (8th Cir. 1971).

[14] Again, as to the propriety of the Fifth Circuit's finding *Rodriguez* a class action, we defer to East Texas Motor Freight's Petition.

Title VII litigation concerning those rules has proliferated beyond control,[15] without final resolution. Thus the legality of the seniority system at issue, and the liability of union entities who negotiate and contract for it, presents a question with dimensions far beyond the instant case—one which must finally be resolved by this Court. A more compelling reason for granting this Writ can scarcely be imagined.

Here the Fifth Circuit found the contract seniority system and union defendants in violation of Title VII and 42 U.S.C. § 1981 because no specific contract provision entitled *all* minority city employees to transfer to road driving jobs taking with them their city job seniority. But trial evidence and stipulations as well demonstrate beyond cavil that not *all* minority city employees were discriminatorily denied road jobs. Surely, minority employees who have been discriminatorily denied road employment are entitled to "rightful place" seniority in the road bargaining unit—that seniority they would have had "but for" discrimination.[16] By the same token, Anglo road drivers who possess road jobs and consequent seniority are entitled to maintain their seniority and job rights as against minority individuals who have *not* been discriminatorily denied road employment.

> "Although Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act, it certainly did not desire to melt job qualifications having no racially discriminatory ingredient or controlling pre-Act antecedent. In light of Title VII's legislative history, ascribing such an

---

[15] Nearly one hundred such cases are pending or have been decided by lower courts throughout the federal judiciary system. See Footnote 26 of Petition of International Brotherhood of Teamsters, *International Brotherhood of Teamsters v. United States* (No. 75-636, October Term 1975).

[16] *Sing v. Roadway Express, Inc.*, 485 F.2d 441 at 450 (5th Cir. 1973).

> altruistic yet impractical purpose to that legislative body would surely be erroneous—'reverse discrimination' of the most blatant sort." *United States v. Jacksonville Terminal, et al.*, 451 F.2d 418 at 445 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

By holding the seniority system and union defendants in violation of Title VII and 42 U.S.C. § 1981, solely because they do not make provision for *all* minority city employees to transfer to road driving jobs with their full city job seniority, the Fifth Circuit convicts both the system and unions for not engaging in the very "reverse discrimination" that the Fifth Circuit itself says Title VII prohibits!

The Fifth Circuit commits serious error when it holds this contract seniority system illegally discriminatory. That court's complaint—that the system doth not automatically provide for minority city employees to transfer to road jobs taking their full city seniority with them—is misplaced. In so holding, the Fifth Circuit says nothing more than that the seniority system does not *automatically* provide road bargaining unit seniority for those whom an employer has discriminatorily excluded from the bargaining unit. No seniority system can automatically provide seniority for individuals whom the employer excludes from it. This, the Fifth Circuit itself has recognized.[17] But union defendants here have negotiated and contracted for a provision, in applicable collective bargaining agreements, prohibiting race or national origin discrimination.[18]

---

[17] *Franks v. Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974) (cert. granted, No. 74-728); *Watkins v. Steel Workers*, 516 F.2d 41 (5th Cir. 1975).

[18] The National Master Freight Agreement, part of the agreements covering city and road employees, provides at Article 38 as follows:

> "The Employer and the Union agree not to discriminate against any individual with respect to his hiring, compensation, terms

Further, unions have consistently proposed that minority city employees who have been discriminatorily denied road employment be awarded the opportunity to transfer to the road, with job seniority in the road bargaining unit from the date they would have had road employment absent discrimination. No contract seniority system or union can do more than this.

This contract seniority system, providing job seniority for city and road employees upon their entry into the particular, separate bargaining unit, has legitimate, nondiscriminatory origins. It is the seniority system that both city and road employees desire. City jobs are not menial jobs. They pay well, and many employees, both minority and white, prefer them to road jobs. City jobs are not in a line of progression with road jobs. In sum, the seniority system here is wholly distinguishable from a plant, line-of-progression job classification seniority system which draws artificial distinctions within a single bargaining unit and locks minorities into the most menial, low paying jobs which no employee with any choice desires to fill.[19] If there can be a "bona fide seniority system," which Title VII recognizes and purports to protect, the system in the cases at bar must be one.

For the foregoing reasons and those urged in *International Brotherhood of Teamsters v. United States of America* (No. 75-636, October Term 1975), this Court must resolve all question as to the legality of this seniority system at issue.

---

or conditions of employment because of such individual's race, color, religion, sex or national origin, nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of his race, color, religion, sex, or national origin."

[19] See *Quarles v. Phillip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968); *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), cert. den. 397 U.S. 919 (1970).

IV

The Effect of the Employers' No-Transfer Rule.

Finally, the Fifth Circuit failed to give proper consideration to uncontradicted evidence that East Texas Motor Freight and Yellow Freight had and have "no transfer" rules prohibiting transfer between city and road classifications.[20] Where transfer between city and road is absolutely prohibited, a contract rule providing for loss of job seniority in one unit and assumption of job seniority in the other from the date of entry therein could not be a causal factor affecting transfer.

The compelling logic of the foregoing statement was readily apparent to the trial court and the Sixth Circuit in *Thornton v. East Texas Motor Freight, supra*. There, in a case involving precisely the same seniority rules, the trial court concluded that local union liability[21] rested solely on the existence of East Texas' no transfer rule. Reviewing the evidence that the no transfer rule originated with the employer, was not a creature of collective bargaining and applied equally to all employees, regardless of race, the Sixth Circuit reversed the trial court and specifically found no violation of Title VII on the part of the local union defendant.

All of the afore-cited considerations, determinative of union liability in *Thornton*, are present in *Rodriguez* and *Herrera*. The Fifth Circuit's disregard of the obvious fact that under such circumstances contract seniority rules could have no causal effect, and its finding of Title VII and 42 U.S.C.

---

[20] East Texas relaxed its no transfer rule for one thirty-day period in 1972.

[21] The International Brotherhood of Teamsters and Southern Conference of Teamsters were dismissed in *Thornton* upon jurisdictional grounds.

§ 1981 violation on the part of the union defendants is in direct conflict with *Thornton*. For this last reason, too, this Petition must be granted.

CONCLUSION

Wherefore, Writ of Certiorari should issue to review the judgments of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted

G. WILLIAM BAAB
L. N. D. WELLS, JR.
8204 Elmbrook Drive, Suite 200
Dallas, Texas 75247

DAVID PREVIANT
6th Floor Midland Bank Building
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

MULLINAX, WELLS, MAUZY &
BAAB, INC.
8204 Elmbrook Drive, Suite 200
Dallas, Texas 75247

GOLDBERG, PREVIANT &
UELMEN
6th Floor Midland Bank Building
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Certificate of Service

In accordance with the rules of the Court, true copies of the foregoing have been served upon the following counsel of record by placing same in the U. S. Mail with first class air mail postage prepaid on this 13th day of November, 1975:

Mr. James Heidelberg
327 San Antonio Bank & Trust Bldg.
711 Navarro Street
San Antonio, Texas 78205

Mr. Ruben Montemeyer
301 W. Market Street
San Antonio, Texas 78205

Ms. Debra A. Millenson
Equal Employment Opportunity Commission
2401 E. Street, N.W.
Washington, D. C. 20506

Mr. Harry A. Rissetto
Morgan, Lewis & Backius
1140 Connecticut Ave., N.W.
Washington, D. C. 20036

Mr. Paul Scott Kelly, Jr.
Gage & Tucker
1000 Bryant Bldg.
Kansas City, Missouri 64106

Mr. Theo F. Weiss
1805 National Bank of Commerce Bldg.
San Antonio, Texas 78205

Mr. Edward W. Penshorn
519 Majestic Bldg.
San Antonio, Texas 78205

G. William Baab

APPENDIX A

In the District Court of the United States
For the Western District of Texas
San Antonio Division

Jesse Rodriguez, et al., v. East Texas Motor Freight, et al.,	Civil Action No. SA-71-CA-302

Findings of Fact and Conclusions of Law

On the 29th day of January, 1973, came on to be heard the above entitled and numbered cause for trial on the merits, and both parties appeared in person and by their Attorneys of Record and announced ready for trial, whereupon the Court proceeded to hear the evidence from the witnesses and oral arguments of counsel and at the conclusion of the trial and after consideration of all the pleadings, the evidence adduced by both parties, the arguments of counsel and applicable law, the Court hereby makes its Findings of Fact and Conclusions of Law.

Findings of Fact

1. This Court has jurisdiction of this action by virtue of Title 42, U.S.C., Section 2000e-5(f) and Title 28, U.S.C., Section 1343 (4) providing a cause of action under Title 42, U.S.C., Section 1981.

2. The plaintiffs are employees of the defendant truck line and members of the defendant Union and its affiliates (Local 657 of the Southern Conference of Teamsters and the Interna-

tional Conference of Teamsters), with the exception of the plaintiff, Jesse Rodriguez, who is no longer an employee of the defendant truck line. Plaintiffs are all Mexican-American residents of the United States and residents of San Antonio, Bexar County, Texas. The defendant truck line is a corporation doing business in the State of Texas and the City of San Antonio and operates and maintains a local city-wide freight terminal and a city-wide trucking service in San Antonio, Bexar County, Texas and is an employer within the meaning of Title 42, U.S.C., Section 2000e-(b). The defendant Union and its affiliates are the representatives and bargaining agents of the plaintiff employees on an international, regional and local basis.

3. All plaintiffs were hired by the defendant truck line as regular city pick-up and delivery drivers on the dates set out herein and have remained in that capacity to the present time.

Jesse Rodriguez — Sept. 1965

Modesto Herrera — May, 1965

Sadrach Perez — May, 1959

4. It is stipulated that none of the plaintiff employees were discriminated against as to their original employment.

5. Except for one road driver employed by the Valley Copperstate Sunset Lines, who was transferred from San Antonio, Texas immediately after the merger in 1970 with East Texas Motor Freight, the defendant truck line has never had any road drivers domiciled in San Antonio, Bexar County, Texas and the San Antonio terminal is operated solely as a local, city-wide pick-up and delivery service.

6. It is stipulated that prior to and subsequent to the effective date of Title VII of the 1964 Civil Rights Act to the date that Jesse Rodriguez filed a charge of discrimination with the Equal Employment Opportunity Commission (E.E.O.C.) the de-

fendant truck line had never employed a Negro or Mexican-American as a line driver in the State of Texas covered by the Southern Conference Area Supplemental Agreement.

7. It is stipulated that except for having been received and filed locally by the Terminal Manager Sager in August 1970, the defendant truck line has never considered the written applications for employment as road drivers of the plaintiffs. Such applications were transmitted to the Dallas corporate office of the defendant truck line subsequent to the filing of the E.E.O.C. charges involved herein.

8. It is stipulated that the claim of discrimination of the plaintiffs is solely based upon the fact that after their original employment they have been "locked in" to the lower paying job of city driver and have been denied a job as road driver because:

(a) of the maintenance of separate seniority rosters for city and road drivers;

(b) of the fact that any city driver, regardless of his race, if he transferred from city driver classification to a road driver classification, loses his accumulated city seniority;

(c) the defendant truck line discouraged inquiries from the plaintiffs concerning the qualifications and/or availability of road driver jobs;

(d) the defendant truck line had always employed Anglo/white applicants as road drivers; and

(e) the defendant truck line's policy and practice has been based to a great extent on a word of mouth system. Since the defendant truck line's road drivers and supervisory and terminal personnel are almost exclusively Anglo/white, such a practice has continued the al-

leged illegal exclusion of Mexican-Americans and Negroes as road drivers.

9. It is further stipulated that the only issue presently before the Court pertaining to the defendant truck line is whether or not its failure to consider the plaintiffs' road driver applications constituted a violation of Title VII and 42 U.S.C., Section 1981.

10. On April 1, 1970 the defendant truck line and the defendant Union entered into the National Master Freight Agreement and Southern Conference Area Local Freight Forwarding Pick-up and Delivery Supplemental Agreement (hereinafter referred to as "Union Contract") which expires June 30, 1973 and the terms and conditions of which are fully known and understood by the plaintiff employees. The plaintiff employees have ratified this contract and prior similar contracts since the time of their employment, with the exception of Jesse Rodriguez who voted against ratification of the current contract solely because of the strike and lock-out by the Chicago bargaining unit in the Spring of 1970 and not due to any contract clause made the subject of this suit.

11. The provisions of the Union Contract providing for job transfer from a city driver to a road driver and vice versa, including the provision for separate seniority lists for city and line drivers, apply to all job applicants and employees regardless of race or qualifications, and are not in any way discriminatory.

12. The defendant truck line's policy and regulations regarding job transfers are generally:

(a) The applicant must relinquish his current position;

(b) The applicant must make written application for a new position at terminal location where the job is sought;

(c) The applicant must be willing to re-locate at the new terminal location;

(d) For a road driver job, applicants must pass certain standardized Department of Transportation tests and company tests (driving and physical); and

(e) The applicants must have certain road driving experience.

These regulations are not unreasonable and apply to all job applicants and employees regardless of race or qualifications. It is stipulated that the standards and qualifications of the defendant truck line for its road drivers are not discriminatory. The fact that each terminal is autonomous as concerns the employment of drivers is proper and in accordance with accepted business practices.

13. The plaintiff employees testified that they were unwilling or at least ambivalent to comply with the job transfer requirements even when confronted with a hypothetical opportunity to make the job change under the existing regulations "tomorrow" assuming a position was available. Thus, plaintiffs' objections are not grounded on lack of job availability, but rather on the stringency of the regulations.

14. There has been no showing of discrimination as regards the hiring practices of the San Antonio Terminal office of the defendant truck line.

15. The plaintiff employees have never filed a discrimination grievance charging a violation under Article 38 of the Union Contract, but originally filed a Complaint with the Equal Employment Opportunity Commission.

16. The plaintiff employees have never availed themselves of participating in the contract amendment negotiation meetings at the local Union level in an effort to change the job transfer requirements.

17. The plaintiff employees have not been discriminated against by their Union. The Union is comprised of a majority

of Mexican-Americans and Negroes and every member is free to participate in the contract negotiating process and to vote on every issue or contract presented to the membership.

18. When the plaintiff employees inquired from various supervisory personnel at the San Antonio Terminal as to the method of securing a road driving position, they were not discouraged nor misled, but rather the requirements were explained (i.e. they would have to make application at the road driving terminal location, etc.). The failure of the plaintiff employees to secure a road driving position was due to an unwillingness to give up their city driving seniority and an inability to meet the job qualifications rather than actual racial discrimination by either the defendant truck line or the defendant Union.

19. In January, 1972, the company made the following modification in its no-transfer policy: during a period of 30 days at any terminal where line drivers were domiciled, a city driver could make application for transfer to a line driver's job. He would be given the necessary tests and if he qualified, as a road driver job opened up or became available, he would be permitted to take the job. In effect, the requirement of three years immediate prior line haul road experience was temporarily waived as to such city drivers.

In the area covered by the Southern Conference of Teamsters, there were 202 applications by city drivers. Some of them failed to qualify or to pass the required tests. Some qualified, but did not like over-the-road driving and voluntarily went back to city driving. In the end, only five city drivers successfully made the transition or transfer to over-the-road drivers' jobs. All five of these worked out of the Memphis, Tennessee, terminal.

20. The plaintiff, Jesse Rodriguez, continues in his employment with the defendant truck line as a city driver. His driving

and work record includes numerous accidents (at least three) and at least five injuries.

21. The plaintiff, Modesto Herrera, continues in his employment with the defendant truck line as a city driver. His driving and work record includes at least three accidents, at least seven injuries, much time off because of injuries, and at least four warning letters, three of which involved abnormally low productivity.

22. The plaintiff, Sadrach G. Perez, was employed by the defendant truck line as a city driver until his discharge for cause on May 18, 1971. His driving and work record included the following:

(1) On January 18, 1966 he claimed to have been totally and permanently disabled in an accident in which he hurt his back stacking boxes. In June of 1966 he filed suit in the District Court of Bexar County, Texas, appealing from an award of the Industrial Accident Board and alleging that he was "totally and permanently incapacitated". On July 27, 1966 this suit was voluntarily dismissed. There was no settlement with or payment by ETMF's compensation carrier.

(2) On October 22, 1970 Sadrach G. Perez was given a warning letter by the then terminal manager for violating instructions and a long-standing policy of the terminal.

(3) On January 28, 1971 Perez was dispatched with a shipment to Lackland Air Force Base. The shipment included 471 pieces, totaling 5,133 lbs., with most of the pieces weighing around 11 lbs. and no piece weighing more than 25 lbs.

He complained to the Assistant Terminal Manager Ezra Beierle that the truck in which the merchandise was loaded

did not have a lift gate and wanted to unload the merchandise onto a truck that did have a lift gate. Beierle refused, telling him to proceed with the delivery.

Perez then went to the office of Terminal Manager Asbury and demanded that the truck be unloaded and the merchandise loaded onto one having a lift gate. The argument consumed about 20 minutes. Asbury told him to proceed with the delivery. Perez left with the statement, "I've been too good too long."

He proceeded to Lackland where he took a total of five hours to deliver 5,133 lbs. at one location.

He was given a written reprimand and warning because of the incident.

(4) A few days later, he filed a Workmen's Compensation claim asserting that on the Lackland delivery on January 28, 1971 he injured his left shoulder and upper back and neck.

(5) On January 29, 1971 he was given a written warning notice because of partial absences from work on January 26, 27 and 28.

(6) On March 26, 1971 he was given a warning notice because of his failure to make a delivery on March 24, 1971 at Solo Serve, the warning notice citing other instances in February, 1971 of poor production by him.

(7) On March 26, 1971 he was given a warning notice in connection with a delivery at Sonney Plumbing and Air Conditioning Company. He had unloaded the merchandise on the ground. When the lady in charge, Mrs. Mary Fewell, asked him to place it on the dock, he refused, claiming that the stacking of the merchandise on the ground completed the delivery. Mrs. Fewell wrote a letter to the

company protesting the fact that Perez was disrespectful and discourteous to her.

(8) On May 18, 1971 Perez was dispatched with a load of drugs to the Scobey Warehouse. The boxes had been segregated by numbers in the trailer at the point of origin (Chicago). The instructions to Perez were that he was to load them on pallets at the Scobey Warehouse according to the instructions.

Perez became involved in an argument with the Scobey supervisor about how the pallets were to be delivered to him. Assistant Manager Beierle made a trip to Scobey's to attempt to solve the problems which Perez had created.

Terminal Manager Asbury and Beierle made another trip to Scobey's attempting to solve the problems.

Finally, about 2:45 P.M., Asbury received a call from Chicago in which the shipper complained about the way its merchandise was being handled at Scobey's, Scobey's having apparently reported to the shipper. Perez was ordered to lock the trailer and return to the terminal, where he was discharged by Asbury.

(9) Local Union No. 657 filed a grievance in connection with the discharge which eventually reached arbitration and was heard by the Joint Committee at a meeting in Biloxi, Mississippi. After a full hearing, the committee decided in favor of the company and against Perez (and the Union). At the hearing, evidence was introduced that more than ten (10) customers of the company had given instructions not to send Sadrach Perez back to their places of business, stating that they would refuse the freight if it was to be delivered and would not give up freight if he was to pick it up.

(10) On July 19, 1971 Perez filed a charge with the National Labor Relations Board against the International

Brotherhood of Teamsters alleging a violation of the act in its failure to properly represent him. The Regional Director declined to issue a complaint. Perez appealed to the General Counsel who denied the appeal. Represented by counsel, Perez has a current claim pending before the Industrial Accident Board arising out of the 1971 alleged accident in which he claims that he is totally and permanently disabled, claiming to have a bad back.

23. None of the plaintiff employees could satisfy all of the qualifications for a road driver position according to the company manual due to age or weight or driving record. The qualifications apply universally to all job applicants and employees and are not in any manner racially discriminatory.

24. The driving, work, and/or physical records of the plaintiffs are of such nature that only casual consideration need be given to determine that the plaintiffs cannot qualify to become road drivers. The failure of the defendant truck line to proceed with a detailed, comprehensive consideration of the plaintiffs' applications was for valid business reasons and not because of any discrimination against any of the plaintiffs because of their race or national origin.

25. Both the defendant truck line and the Union defendants are bound by the contracts in that neither can unilaterally change the contract provisions by allowing a merger of seniority lists, a transfer of seniority or in any other manner attempt to alter, combine or discard the provisions of the separate contracts for city and road drivers without subjecting themselves to economic or other negative sanctions by the non-offending party.

26. Refusal by the defendant truck line to permit job transfers without loss of terminal seniority or to maintain separate seniority lists is a reasonable and proper business practice and

in accordance with the Union Contract and in no manner causes, perpetuates or results in discriminatory practices by any of the defendants.

27. The fact that there are separate Union Contracts and job qualifiications for city and road drivers is reasonable both as an accepted business practice and by the fact that the National Labor Relations Board recognizes the two job groups as separate bargaining units.

28. The defendant truck line did not prevent or discourage the plaintiff employees from seeking or securing a road job transfer nor from making written application for said position because of their race or because they filed a Complaint with the Equal Employment Opportunity Commission, or for any other reason.

29. The defendant truck line and Union did not discriminate against the plaintiff employees because they made a charge or indicated they would make a charge against the defendants to the Equal Employment Opportunity Commission.

30. The defendants did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise.

31. Plaintiffs have at no time moved for a prompt determination of the question of whether or not this cause of action should be maintained as a class action and have offered no credible proof on the question.

32. Plaintiffs have offered no proof of liability or damages as to any class, having confined the evidence, arguments and post trial brief to the individual claims of the named plaintiffs, and having stipulated at the commencement of trial that the only issue before this Court with respect to the defendant truck line involved its failure to consider the individual plaintiffs' applications for employment as road drivers.

33. While not compelling, further evidence of a continuing desire of the majority of the local Union membership is contained in the Affidavit of R. C. Shafer, President and Business Manager of the local Union, and George Hardeman, Jr., Recording Secretary of the local Union, filed February 23, 1973. The parties have stipulated that, if called, these two men would testify that at the Union Membership meeting on February 11, 1973, after the trial of this case was completed, the employees of the defendant truck line, and others, rejected proposals that the next City and road driver contracts be merged and that both job classifications be permitted to transfer to the other with company seniority for all purposes. A further proposal to the effect that the seniority of the employees working for the truck lines remain as it is in the current contracts was approved by a vote in excess of two to one.

Conclusions of Law

1. I conclude as a matter of law that none of the defendants violated Title 42, United States Code, Section 2000e-5 or any section of Title 42 relating to race discrimination.

2. I further conclude that this cause of action is not a proper one for class action and that, therefore, the class action claims in the Complaint should be, and the same are hereby, Dismissed.

3. I further conclude as a matter of law that the plaintiffs, and each of them, take nothing by reason of their suit and that the defendants and each of them are entitled to judgment.

4. I further conclude that the defendants, and each of them, recover their court costs incurred herein against the plaintiffs.

Entered this 22nd day of March, 1973, at San Antonio, Texas.

/s/ JOHN H. WOOD, JR.
United States District Judge

APPENDIX B

Jesse RODRIGUEZ, Sadrach G. Perez and Modesto Herrera, on their own behalf and on behalf of those similarly situated, Plaintiffs-Appellants,

v.

EAST TEXAS MOTOR FREIGHT, Southern Conference of Teamsters and Teamsters Local 657, Defendants-Appellees.

No. 73-2801.

United States Court of Appeals, Fifth Circuit

Nov. 25, 1974.

Mexican-American city truck drivers brought employment discrimination class action against motor carrier and union organizations challenging carrier's requirement that city drivers resign their jobs before applying for more lucrative road positions and rule preventing city drivers from carrying their seniority to road jobs. The United States District Court for the Western District of Texas, John H. Woods, Jr., J., found that class action was inappropriate and that defendants had not violated civil rights statutes and the plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that plaintiffs met class action requirements and could maintain action on behalf of carrier's Mexican-American and Negro city drivers who were included in collective bargaining agreement; that evidence that discrimination had been practiced in the past in hiring of road drivers, that "no transfer" policy and maintenance of separate seniority rosters for city and road drivers perpetuated the past discrimination and that there was no business necessity preclud-

ing hiring of city drivers for road driver positions established that carrier had discriminated against plaintiffs and the plaintiff class; and that participation by union organizations in establishment of separate seniority rosters constituted violation of civil rights statutes.

Reversed and remanded.

1. Federal Civil Procedure Key 161

Class action may not be dismissed because class representatives fail to ask for ruling on propriety of class nature of suit; responsibility for determining propriety of class nature of suit falls to trial court. Fed.Rules Civ.Proc. rule 23(c)(1), 28 U.S.C.A.

2. Federal Civil Procedure Key 184

Plaintiff class representatives who instituted employment discrimination action were required to establish that the action met requirements of class action rule. Fed.Rules Civ.Proc. rule 23 (a), 28 U.S.C.A.

3. Federal Civil Procedure Key 184

Requirements of class action rule must be read liberally in suits brought under equal employment opportunity provisions and equal rights provision of civil rights statutes. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Federal Civil Procedure Key 184

Suits brought under equal employment opportunity provisions and equal rights provision of civil rights statutes are inherently

class suits. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Federal Civil Procedure Key 184

Discrimination on the basis of race or national origin is a class wrong. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Federal Civil Procedure Key 184

Antagonism between Mexican-American city truck drivers, who instituted employment discrimination action challenging policy precluding transfer of city drivers to road driver jobs, and majority of membership of local union with respect to whether separate seniority lists of city and road drivers should be merged did not indicate antagonism with regard to contention that motor carrier and union organizations had discriminatorily excluded minorities from road driver positions and did not preclude maintenance of the action as a class action. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. Federal Civil Procedure Key 1741

In order to remove possible antagonism between class representatives who instituted employment discrimination action challenging motor carrier's policy precluding transfer of city drivers to more lucrative road driver jobs and some city drivers, trial court could have narrowed class or separated it into subclasses for purposes of relief or could have shaped relief to avoid any injustice to dissenting members and, therefore, antagonism

did not require dismissal of class action. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Civil Rights Key 46

District courts have wide discretion in fashioning relief under equal employment opportunity provisions of Civil Rights Act. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Civil Rights Key 46

Flexibility and careful tailoring of judicial decrees in actions brought under equal employment opportunity provisions of Civil Rights Act are the order of the day. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. Federal Civil Procedure Key 184

Plaintiffs who instituted employment discrimination action were not required to present more than prima facie case of discrimination against class in order to maintain action as class action. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

11. Stipulations Key 14(4)

Plaintiffs who instituted employment discrimination action challenging motor carrier's policy precluding transfer of city drivers to road driver positions did not abandon their class claims by stipulating that the only issue before the court pertaining to the carrier was whether carrier's failure to consider

the city drivers' applications for road driver positions constituted violation of civil rights provisions, as stipulation was apparently made in an attempt to eliminate confusion in exposition of evidence and not to foreclose class issues, plaintiffs continued to proceed as in a class action and such was made clear to trial court and defendants. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

12. Federal Civil Procedure Key 1741

Dismissal of employment discrimination action on behalf of class consisting of all Mexican-American and black applicants for road driver positions with motor carrier was not improper as plaintiffs never pursued action on behalf of those individuals; class considered for relief would be defined as all of carrier's Mexican-American and black city drivers who were included in collective bargaining agreement and who were precluded by carrier's policy from transferring to more lucrative road positions. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc. rules 23, 23(a), (c)(1), 28 U.S.C.A

13. Civil Rights Key 44(1)

Prima facie case of employment discrimination may be established by statistical evidence and statistical evidence alone. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

14. Civil Rights Key 44(1)

Evidence that motor carrier had never employed a Negro or Mexican-American as a road driver in portion of state covered by collective bargaining agreement prior to filing of employ-

ment discrimination charge, that two and one-half years later carrier had hired three Mexican-Americans to join its road driver force of approximately 180 drivers and that carrier had never hired a Negro road driver in the state established prima facie case of past discrimination in hiring. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

15. Civil Rights Key 43

Once plaintiffs who instituted employment discrimination action established prima facie case of past discrimination in hiring, burden fell to defendants to rebut statistics or to explain disparity in hiring. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

16. Civil Rights Key 39

Employer's present hiring practices could neither explain nor justify employer's past discriminatory hiring practices. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

17. Civil Rights Key 43

Absent proof to the contrary, it would be assumed that "lily white"/Anglo nature of motor carrier's road driver force until filing of employment discrimination charge with Equal Employment Opportunity Commission resulted from discriminatory hiring practices. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

18. Stipulations Key 14(10)

Stipulation that plaintiffs had not been discriminated against when they were hired at trucking terminal as city drivers did

not preclude determination that motor carrier engaged in discriminatory practices in hiring drivers for road positions. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

19. Civil Rights Key 44(1)

Proof that relevant labor pool lacks qualified minority persons may, even in a class action, rebut prima facie case of hiring discrimination. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

20. Civil Rights Key 9.10

Equal employment opportunity provisions of Civil Rights Act do not force employers to hire unqualified applicants of any race or ethnic background. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

21. Civil Rights Key 43

Motor carrier against which minority city truck drivers brought employment discrimination action challenging carrier's policy precluding transfer of city drivers to road driver positions had burden of showing that carrier's history of hiring only white/Anglo road drivers resulted from scarcity of available minority persons qualified to serve in position of road driver. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

22. Civil Rights Key 44(1, 4)

Evidence that motor carrier had discriminated in the past in hiring road drivers, that carrier's policy precluding transfer of city drivers to road driver positions and maintenance of sepa-

rate seniority rosters for city and road drivers perpetuated the past discrimination and that there was no business necessity for carrier's "no transfer" policy and seniority system established that carrier had violated equal employment opportunity provisions of Civil Rights Act. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

23. Civil Rights Key 9.10

To justify policy which perpetuates past discriminatory hiring practices on ground of business necessity, business purpose of the policy must be sufficiently compelling to override any racial impact, it must effectively and efficiently carry out its business purpose and there must be no acceptable alternative practice. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq.. 42 U.S.C.A. § 2000e et seq.

24. Civil Rights Key 9.10

Motor carrier's "no-transfer" policy which precluded transfer by city drivers to more lucrative road driver positions and which perpetuated past discrimination in hiring of road drivers could not be justified under business necessity theory on grounds that policy was necessary to protect employees, property and the general public from unqualified drivers or on ground that majority of blacks and Mexican-Americans of union local comprised of city drivers had rejected proposal to merge city and road seniority rosters and that if it had taken action to merge seniority lines, carrier might have been subject to legal action by those who desired dual lists. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

25. Civil Rights Key 43

Plaintiffs who brought employment discrimination class action challenging motor carrier's policy which precluded transfer

by city drivers to more lucrative road driver positions were not required to prove that class, which was composed of city drivers, contained those qualified to assume road driver responsibilities; carrier had burden of proving that none of the class was qualified to transfer to road driver positions. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

26. Civil Rights Key 9.10

It is discriminatory to require experience as a prerequisite to employment when experience is unavailable to minority persons. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

27. Stipulation Key 14(10)

Stipulation that motor carrier's standards and qualifications for its road drivers were not discriminatory did not constitute waiver of contention, asserted in employment discrimination action brought by minority city drivers who were precluded by carrier's policy from transferring to more lucrative road driver positions, that road driving requirements, including requirement of three years' prior experience as a road driver had a disparate impact and discriminatory effect. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

28. Civil Rights Key 9.11

Discrimination against black and Mexican-American city truck drivers resulting from motor carrier's policy precluding transfer by city drivers to more lucrative road driver positions from which minorities had been excluded in the past was continued and reinforced by union action which resulted in city and road drivers being placed in separate bargaining units with seniorities running from date of entry into the particular unit

and, therefore, union organizations were liable for employment discrimination. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

29. Civil Rights Key 43

Prima facie case of past hiring discrimination and proof that seniority system which was creature of collective bargaining agreement transmitted discrimination into the present shifted burden to union organizations to show that present discriminatory effects were unavoidable and required by business necessity. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

30. Civil Rights Key 9.11

Union organizations could have eliminated "lock-in" effect of separate seniority rosters for city and road truck drivers without merging rosters and jeopardizing seniority rights of city drivers who wished to remain in their positions by allowing seniority carryover on a one-time-only basis for qualified city drivers who wished to transfer to more lucrative road driver positions; thus, union organizations could not escape liability for present discriminatory employment effects of past exclusion of minorities from road driver positions on ground that the discriminatory effects were unavoidable and required as a business necessity. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

31. Civil Rights Key 46

District courts have broad remedial powers to eliminate present effects of past employment discrimination and a large measure of discretion in modeling a decree. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

32. Civil Rights Key 9.10

Those who suffer employment discrimination must be permitted to take their rightful place when job openings develop. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

33. Civil Rights Key 46

Black and Mexican-American city truck drivers, many of whom could have been road drivers but for discrimination with respect to hiring of road drivers, were entitled to opportunity to transfer to road driver positions as such positions developed and could meet experience requirement by showing three years of city driving on equipment similar to that used over the road, notwithstanding employer's rule requiring three years of road driver experience. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

34. Civil Rights Key 46

Fact that not all motor carriers required three years' experience as prerequisite for road driver positions did not require reduction in number of years of experience required by motor carrier as prerequisite for permitting its city drivers, who were victims of past discrimination with respect to hiring for road driver positions, to transfer to position of road driver as, following removal of requirement that prior experience be as a road driver, experience required was not only racially neutral but was neutral in effect. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

35. Civil Rights Key 9.10

Equal employment opportunity provisions of Civil Rights Act were not intended to lead to uniform hiring practices across an industry; so long as hiring policies do not discriminate, the

provisions do not require their modification. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

36. Civil Rights Key 9.13

City truck drivers who were required to be given opportunity to transfer to more lucrative road driver positions from which they had previously been discriminatorily excluded could not be disqualified from road driver positions even if they performed inadequately on road test unless they could not be expected to improve sufficiently given normal training. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

37. Civil Rights Key 46

In employment discrimination action challenging motor carrier's policy against transfer of city truck drivers to road driver positions, trial court's determination that named plaintiffs were unqualified for road driver positions was premature where carrier admitted by stipulation that it had not considered any of the plaintiffs for employment as road drivers. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

38. Civil Rights Key 9.12

Question of how much seniority city truck drivers would be permitted to take with them upon transfer to road driver positions from which they had previously been discriminatorily excluded should be determined by date on which city drivers would have qualified for the road driver positions but for discrimination. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

39. Federal Civil Procedure Key 2397

Judgment by consent binds parties and those in privity with them. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

40. Judgment Key 707
Release Key 27

Consent decree entered in government's "pattern and practice" suit against motor carrier and union organizations challenging discriminatory employment practices which were at issue in subsequently brought private class action did not operate as collateral estoppel to prohibit members of class from participating in relief in the class action where members of the class were neither parties to the government suit nor had interests in privity with the government; however, those members of class accepting compensation under consent decree and signing release would be bound by terms of the release. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, AINSWORTH and GODBOLD, Circuit Judges.

WISDOM, Circuit Judge:

In this employment discrimination case the plaintiffs-appellants attack two ubiquitous practices in the trucking industry: (1) the trucking companies' requirement that "city drivers" resign from their city driver jobs before applying for the more

lucrative and sought-after "road" or "line driver"* positions, and (2) the companies' rule preventing city drivers from carrying their seniority to road driver jobs. The plaintiffs, Mexican-American city drivers for East Texas Motor Freight (ETMF), brought this action below as a class action, contending that these facially neutral practices of ETMF and the defendant union organizations perpetuate the effects of past discriminatory hiring practices and thus violate Title VII of the Civil Rights Act of 1964[1] and 42 U.S.C. § 1981.[2] The district court found

---

* The terms "road driver" and "line driver" are used interchangeably throughout this opinion.

[1] (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . . . .

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2.

[2] All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce

that the cause of action was inappropriate for a class action, and that none of the defendants had violated Title VII or Section 1981. We reverse.

I

Facts

In the trucking industry, "road" or "line driver" is considered a separate job classification from "city, pick-up and delivery driver." Road drivers for ETMF drive 10-speed tractors with semitrailers, carrying freight among the 52 ETMF terminals in 19 states. Road drivers work long hours, and often spend long periods of time away from home, but they have the prestige driving job in the trucking industry, and they generally bring home the highest pay. Freight brought to a terminal by a road driver is unloaded and reloaded onto other trucks, either onto another tractor-trailer, or onto a "bobtail", a truck with the body and engine mounted on the same chassis. A city driver then delivers the merchandise locally.

In conformance with the practice in the trucking industry generally, ETMF "domiciles" road drivers at only some of its terminals: those in cities that are relay points equidistant between major centers, and those in "head haul" cities, cities at the end of a line of service that generate a significant amount of freight to other points in the company's system. In Texas ETMF has six terminals that domicile road drivers, and fifteen terminals that do not.[3] ETMF has city drivers at all terminals.

---

contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishmen', pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981.

[3] Those terminals domiciling road drivers are: Dallas, El Paso, Longview, Pecos, San Angelo, and Texarkana. Only city drivers are

The primary responsibility for hiring drivers, both city and road, in the ETMF system rests with the manager at the terminal where a vacancy occurs. The manager interviews applicants, reviews their qualifications, and makes recommendations to officials at the corporate headquarters in Dallas. Although the Dallas officials must approve each applicant for employment, the terminal manager makes the affirmative decision to hire. The unions have no responsibility for hiring.

ETMF's qualifications for road drivers are more stringent than for city drivers. City drivers must be at least 21 years old and have at least one year pick-up and delivery experience. Road drivers must be at least 27 years old and have three years "immediate prior line haul road experience". Both city and road drivers face a battery of other requirements involving driving, work, credit, and police records. They must be familiar with Department of Transportation regulations, have a high school education or the equivalent, and hold a valid commercial drivers license. Finally, both city and road drivers must pass physical, written, and driving examinations. Everett E. Cloer, ETMF's Vice President in charge of industrial relations testified to the importance of driving tests for road drivers: "Well, first of all [applicants] are given a 25-mile driving test within the city to see if they can handle the transmissions of this equipment, see what their driving reactions are, et cetera. If they pass that, then they are given an in-cab trip with the supervisor. The supervisor rides with them on a student [over-the-road] trip."[4] Counsel for the parties stipulated that the line driver requirements are nondiscriminatory.

---

domiciled at the following terminals: Abilene, Amarillo, Atlanta, Austin, Beaumont, Brownwood, Ft. Worth, Henderson, Houston, Lubbock, Lufkin, Marshall, Odessa, San Antonio, and Tyler.

[4] The importance of road testing as a criterion for hiring road drivers was echoed by Ed A. Asbury, Manager of ETMF's San Antonio terminal. When asked how he would determine whether city drivers were qualified to be road drivers, he answered: "I think

City drivers and road drivers are covered by different collective bargaining agreements. The defendant-appellee Local 657 has a collective bargaining agreement with ETMF covering city drivers at ETMF's San Antonio terminal. Local 657 represents no road drivers of ETMF. The defendant-appellee Southern Conference of Teamsters, a delegate body of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, is made up of representatives from the affiliated Locals in ten southern states. Separate collective bargaining agreements for city and road drivers are drawn by the Southern Conference and negotiated by the Conference with trucking company representatives. Then the agreements are passed down to the Locals to be approved and made part of the contracts between the Locals and the trucking companies.

Since 1954 ETMF has followed a "no-transfer" policy, prohibiting the transfer of drivers between city and road driver classifications and between terminals.[3] Under the policy, in order for a city driver to obtain a position as a road driver, he must resign his city driver job and apply for a road driver slot. He thereby forfeits all accumulated seniority. In effect, he stands on no better footing in applying for a road driver job than a complete stranger to the company. For the purposes of strengthening his application, he gains no "credit" for his years as a city driver. And if his bid to be a line driver fails, there is no guarantee that he will be rehired as a city

---

I should have to ride with those boys to be able to answer that question. I don't know . . . I would have to—if I were going to make an honest appraisal, I would get out and ride with that man. I would ride with him here in town, and I would ride with him on the freeway. I would ride with him in line haul equipment. I would see what he would do, how he conducted himself, how he handled his equipment."

[3] Road drivers for ETMF presently operate under a "modified" terminal no-transfer policy. If a road driver at one terminal is laid off, he can "bump" a less-senior road driver at another terminal.

driver. ETMF's policy against transfers is complemented by the fact that under collective bargaining contracts between ETMF and Local unions, including the defendant Local 657, city drivers who transfer to the road do not carry over their "competitive-status" seniority, that is, seniority for job bidding and lay off purposes.[6] Under separate collective bargaining agreements for road and city drivers, competitive-status seniority runs from the time an employee enters a particular collective bargaining unit. Transfer is not expressly prohibited, but it is not expressly permitted either, and the agreements have been universally interpreted to prohibit the carryover of seniority from one classification to another.

For thirty days in January and February 1972, to ease morale problems among its city drivers who wanted to become road drivers, ETMF relaxed its no-transfer policy and permitted city drivers to transfer to line jobs, if they could qualify.[7] During this period, although all other requirements were maintained, the requirement of three years line driving experience was waived. The modification did not affect the dual seniority system established by the separate collective bargaining agreements. Any city driver transferring to the road under the modified policy still lost his seniority for job bidding and lay off purposes. Moreover, the one-time-only change in policy opened the possibility of transfer only to those city drivers who worked out of terminals domiciling road drivers; the restrictions on interterminal transfers remained in effect. In the Southern Conference area 220 city drivers showed an interest in transferring under the temporary policy, and 35 to 50 city drivers tried out: five succeeded in transferring to road driver jobs.[8]

---

[6] The employee keeps his company seniority for fringe benefit purposes.

[7] Road drivers were also permitted to transfer to the city.

[8] All five of the city drivers to make successful transition to road driver jobs worked out of the Memphis, Tennessee, terminal.

Against the history of these policies must be juxtaposed one crucial set of facts. The parties stipulated that before 1970 East Texas Motor Freight had never employed a black or Mexican-American as a road driver in the Texas-Southern Conference area.[9] ETMF's road driver force in that area numbered approximately 180, all white/anglo drivers. After charges were filed by plaintiff Jesse Rodriguez with the Equal Employment Opportunity Commission (EEOC) on August 20, 1970, the company hired three Mexican-American road drivers in El Paso. By the time of trial, the company had still not hired a single black road driver in Texas. In comparison, approximately 35 percent of ETMF's city drivers in Texas are black or Mexican-American. Of a total of 575 city drivers for ETMF in the state, 111 are Spanish-surnamed, 95 are black, and 369 are anglo.

The three named plaintiffs, Jesse Rodriguez, Sadrach Perez, and Modesto Herrera, are Mexican-American city drivers at ETMF's San Antonio terminal. With the exception of one road driver who temporarily worked out of San Antonio in 1970, ETMF road drivers have never been domiciled in San Antonio. San Antonio city drivers were therefore not able to take advantage of the temporary modification of the no-transfer rule in the winter of 1972. Perez was hired as a city driver in 1959, Herrera was hired in 1964, and Rodriguez was hired in 1965. They stipulated that they were employed at the San Antonio Terminal without regard to race, color, or national orgin. Each is a member of Local 657 and the Southern Conference.

Although none of the named plaintiffs made written application for a line driver job until 1970, Herrera made verbal inquiries about transferring to the road as early as 1965. In 1970 the plaintiffs submitted letters to the San Antonio terminal

---

[9] The Southern Conference covers all Teamster members in Texas, except for some in El Paso.

manager, requesting transfer to road driving jobs. The terminal manager received and filed the letters. ETMF stipulated that it never considered these applications for employment as road drivers. On August 20, 1970, Rodriguez filed a written charge with the EEOC complaining that the policies of ETMF, Local 657, and the Southern Conference relegated Mexican-Americans and blacks to city driver jobs. Similar charges were filed by Herrera on March 11, 1971, and by Perez on June 7, 1971. On May 18, 1971, Perez was discharged from his employment with ETMF. The plaintiffs received thirty-day "right-to-sue" letters on October 11 and 13, 1971. On October 26, 1971, the plaintiffs filed this class action suit in district court.

Prior to the trial in this cause, the parties entered into a series of stipulations. In addition to the stipulations already mentioned, the parties agreed to the following:

> The claim of discrimination of the Plaiintiffs is solely based upon the fact that after their original employment, they have been "locked in" to the lower paying job of city driver and denied a job as line driver because of:
>
> (a) The maintenance of separate seniority rosters for city and line drivers;
>
> (b) The fact that any city driver regardless of his race, if he transferred from city driver classification to a road driver classification, loses his accumulated city seniority;
>
> (c) The Defendant East Texas Motor Freight discouraged inquiries from Plaintiffs concerning the qualifications and/or availability of line driving jobs;
>
> (d) The fact that the Defendant East Texas Motor Freight had always employed Anglo/white applicants as road drivers;
>
> (e) That the company's policy and practice of recruiting line or road drivers has been based to a great

> extent on a word of mouth system. Since the company's line drivers and supervisory terminal personnel are almost exclusively Anglo/white, such a practice has continued the alleged illegal exclusion of Mexican-Americans and Negroes as road drivers;
>
> That the only issue presently before the Court pertaining to the company is whether the failure of the Defendant East Texas Motor Freight to consider Plaintiff's line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981.

Over strenuous objection at trial, the district court admitted evidence relating to the qualifications of the named plaintiffs to be road drivers. After trial, the court concluded that none of the named plaintiffs could satisfy all of the road driver requirements "according to the company manual due to age or weight or driving record". Furthermore, the court found, "[t]he driving, work, and/or physical records or the plaintiffs are of such nature that only casual consideration need be given to determine that the plaintiffs cannot qualify to become road drivers". In conclusion, the court found that "[t]he plaintiffs did not discriminate against the plaintiffs or any other employee or union member on the basis of race or otherwise". The plaintiffs appeal. The Equal Employment Opportunity Commission, as amicus curiae, has filed a brief urging reversal of the decision of the district court.

II

The Class Action Claim

The plaintiffs brought this suit "on their own behalf and on behalf of other Mexican-American and black individuals who similarly have been denied equal employment opportunities by the defendants and additionally on behalf of Mexican-American

and black individuals who may, in the future, be denied equal employment opportunities by the defendants because of their national origin and race." They described the class more particularly as "all of defendant East Texas Motor Freight's Mexican-American and black in-city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas . . . [and as] all Mexican-American and black applicants for line driver positions with East Texas Motor Freight included in the above area covered by the Southern Conference of Teamsters from July 2, 1965, to the present." Neither the plaintiffs nor the defendants moved for a ruling under Fed.R.Civ.P. 23(c)(1) as to whether the suit could be maintained as a class action, and the court made no ruling until after the trial was completed. In its findings the court stated:

> 31. Plaintiffs have at no time moved for a prompt determination of the question of whether or not this cause of action should be maintained as a class action and have offered no credible proof on the question.
>
> 32. Plaintiffs have offered no proof of liability or damages as to any class, having confined the evidence, arguments and post trial brief to the individual claims of the named plaintiffs, and having stipulated at the commencement of trial that the only issue before this Court with respect to the defendant truck line involved its failure to consider the individual plaintiffs' application for employment as road drivers.

Concluding that the cause of action was "not a proper one for class action," the court dismissed the class action claims. In our opinion, the district court's dismissal of the class action was erroneous.

[1] Rule 23(c)(1) provides that "[a]s soon as practicable after the commencement of an action brought as a class action,

the court shall determine by order whether it is to be so maintained." A class action may not be dismissed because the class representatives fail to ask for a ruling on the propriety of the class nature of the suit. That responsibility falls to the court. "The court has an independent obligation to decide whether an action brought on a class basis is to be maintained even if neither of the parties moves for a ruling under subsection (c)(1)." Wright & Miller, Federal Practice and Procedure, Civil § 1785 (1972).

[2-5] The plaintiff class representatives, of course, must establish that the action meets the requirements of Rule 23(a).[10] See Rossin v. Southern Union Gas Co., 10 Cir. 1973, 472 F.2d 707, 712; Johnson v. Georgia Highway Express, Inc., 5 Cir. 1969, 417 F.2d 1122, 1125 (Godbold, J., concurring); 3B J. Moore, Federal Practice ¶ 23.02-2 (2d ed. 1974); Wright & Miller, Civil § 1759 at 578. But the requirements of Rule 23(a) must be read liberally in the context of suits brought under Title VII and Section 1981. See Wright & Miller, Civil § 1771. Suits brought under these provisions are inherently class suits. By definition, discrimination on the basis of race or national origin is a class wrong. Oatis v. Crown Zellerbach Corp., 5 Cir. 1968, 398 F.2d 496, 499. And a suit charging employment discrimination is naturally "a sort of class action for fellow employees similarly situated." Jenkins v. United Gas Corp., 5 Cir. 1968, 400 F.2d 28, 33; see Parham v. Southwestern Telephone Co., 8 Cir. 1970, 433 F.2d 421, 428; cf. Newman v. Piggie Park Enterprises, 1968, 390 U.S. 400, 401-402, 88 S.Ct. 964, 19

---

[10] (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23.

L.Ed.2d 1263. When class relief is sought in the complaint, therefore, the court should liberally apply the requirements of Rule 23(a). See Bing v. Roadway Express, Inc., 5 Cir. 1973, 485 F.2d 441, 446; compare Danner v. Phillips Petroleum Co., 5 Cir. 1971, 447 F.2d 159, 164 (class relief not sought in complaint).[11]

[6] There is no serious dispute that the plaintiffs here satisfied the first three criteria in Rule 23(a). The class clearly meets the requirements that the members be so numerous that joinder would be impractical, that there are common questions of law and fact, and that the claims and defenses of the representative parties are typical. The defendants argue strenuously, however, that there was insufficient guarantee that the named parties would "fairly and adequately protect the interests of the class."

The defendants maintain that the named plaintiffs have acted antagonistically to the interests of a majority of Mexican-American and black city drivers. The complaint requests that the court order the city and line driver seniority lists merged to create a single seniority system based solely on the date that an employee first joined the company. The desirability of such relief, argue the defendants, was expressly rejected at a membership meeting of the defendant Local 657 on February 11, 1973, approximately two weeks after the completion of the trial. An affidavit recounting the results of voting at the meeting was admitted into evidence under Fed.R.Civ.P. 59. At the meeting the union members voted 87 to 21 against a proposal that the city and road driver contracts be merged and that city drivers be permitted to transfer to the road while road drivers were permitted to transfer to the city. Of the 138 people present at the meeting, 121 were city pick-up and delivery drivers. Eighty-three were Mexican-American, 42 were Anglo, and 13 were

---

[11] In *Danner* this Court expressly limited its holding: "All we hold is that class action relief must be predicated upon a proper class action complaint satisfying all the requirements of Rule 23". 447 F.2d at 164 n. 10.

Negro. If all possible Anglo votes were deducted from the total against it, the proposal still would have been rejected by a majority of Mexican-American and Negro votes.

We do not ascribe the significance to the vote that the defendants urge. We cannot tell what assumptions were made implicit. Furthermore, the membership of Local 657, even the Mexican-American and black membership, is far from congruent with the class described in the complaint. The Local's membership is both more restricted and more extensive. The Local draws its membership from the San Antonio area; the complaint covers city drivers throughout Texas. The Local has members who work for trucking firms other than ETMF; the class outlined in the complaint is restricted to employees or applicants of ETMF. The extent to which the vote represents the actual preference of the class, therefore, is unclear.

[7-9] Even taking the results of the vote at face value,[12] we reject the district court's conclusion that there was sufficient reason to dismiss the class action in this case. Especially in light of the fact that the evidence of the union vote was not received until two weeks after the trial, there were two preferable options open to the trial judge. First, he could have shaped the class to remove any possible antagonism between the representatives and some of the city drivers. The court could have

---

[12] The outcome of the vote is consistent with what one might expect of a vote of ETMF's San Antonio city drivers. Separate seniority rosters in separate contracts prevent laid-off road drivers from bumping less senior city drivers from their jobs. Because ETMF does not domicile road drivers in San Antonio, to take advantage of a merger of seniority rosters and obtain a road job, a San Antonio city driver with ETMF would have to move to another city. Those city drivers who would not desire such a move, or who would not desire to transfer to the road for some other reason, would not gain from a merger of seniority rosters. We note that in a similar case a court has recently refused to order a merger of seniority rosters because to do so would injure those members of the plaintiff class who did not wish to transfer to road driving jobs. Sabala v. Western Gillette, Inc., S.D.Ky. 1973, 362 F.Supp. 1142, 1153.

narrowed the class or separated it into subclasses for purposes of relief. See Oatis v. Crown Zellerbach Corp., 398 F.2d at 499. Or, the court could have shaped the relief to avoid any injustice to the dissenting class members. District courts have wide discretion in fashioning relief under Title VII: Franks v. Bowman Transportation Co., 5 Cir. 1974, 495 F.2d 398, 414; Bing v. Roadway Express, Inc., 485 F.2d at 448-449. And flexibility and careful tailoring of judicial decrees in Title VII cases are the order of the day. See, e. g., Sabala v. Western Gillette, Inc., S.D.Tex. 1973, 362 F.Supp. 1142. The disagreement here concerned only the proper remedy; there was no antagonism with regard to the contention that the defendants practiced discrimination against the plaintiff class. We do not believe that disagreement within the class as to the remedy desired, surfacing so late in the litigation, should have resulted in a dismissal of the class action.

Because the trial was completed before the court made a ruling whether the class action could be maintained, there were involved none of the imponderables that make the decision so difficult early in litigation, and that demand a substantial amount of district court discretion and corresponding appellate deference. See Johnson v. Georgia Highway Express, Inc., 417 F.2d at 1123. We have before us a record of the proceedings, completed as a class action, and we can judge for ourselves the possible effects of any antagonism of interests. We find these effects insubstantial and curable. We conclude that the plaintiffs met the requirements of Rule 23(a) and established a proper class action under Fed.R.Civ.P. 23(b)(2).[13]

---

[13] (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . . . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

Fed.R.Civ.P. 23.

[10, 11] The district court's finding that the plaintiffs offered no proof on the question of liability or damages to any class is clearly erroneous. As we describe more fully below, the plaintiffs entered into evidence statistics sufficient to present a prima facie case of past hiring discrimination, transmitted into the present by the no-transfer rule and separate seniority rosters which "lock" employees into city driver positions and prevent their transfer to road driver status. The plaintiffs further submitted, without objection, detailed information pertaining to all ETMF city drivers including their names, seniority dates, and domiciles. It is true, as the district court noted, that the plaintiffs concentrated at trial on the individual claims of the named plaintiffs. But the plaintiffs were not required to present more than a prima facie case of discrimination against the class. Nor did the plaintiffs effectively abandon their class claims by stipulating that "the only issue presently before the Court pertaining to the company is whether the failure of the Defendant East Texas Motor Freight to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981". The stipulation was apparently entered in an attempt to eliminate some confusion in the exposition of evidence at trial, not to foreclose the class issues. The plaintiffs continued to proceed as in a class action. And this was made clear to the trial court and the defendants.[14]

---

[14] The following colloquy took place between the trial judge and Mr. Heidelberg, counsel for the plaintiffs:

> THE COURT:
>
> I assume, this being a matter before the court, that Mr. Heidelberg probably has in mind using this witness to establish a general practice and to show that this man was similarly treated although he may have no personal complaint. It would merely corroborate the testimony that such a practice exists. For that limited purpose——
>
> MR. HEIDELBERG:
>
> For that purpose and also, Your Honor, it has not been established that this is not a class action. The allegation is made in the complaint and there have been no motions filed. The

[12] To the extent that the district court's finding that the plaintiffs failed "to offer proof of liability or damages as to any class" refers to the class of "all Mexican-American and black applicants for line driver positions with East Texas Motor Freight", the finding is not erroneous. The plaintiffs never pursued the action on behalf of these individuals, and the district court's dismissal of the class action on their behalf was proper. On remand, the class considered for relief should be defined as all of East Texas Motor Freight's Mexican-American and black city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas.

III

Liability

In the last few years we have seen a large number of suits brought in federal court, attacking facially neutral policies which allegedly discriminate against minority city drivers by perpetuating patterns of discrimination in the hiring of line

---

answers of the defendants deny that this is a class action, but of course we maintain that there is class action involved.

THE COURT:

Well, are you contending now as far as this trial is concerned that this is a class action?

MR. HEIDELBERG:

Yes, Your Honor.

THE COURT:

And how many people are you going to try to establish this by?

MR. HEIDELBERG:

As outlined in the complaint, Your Honor, the class would consist of the Mexican-American and black city drivers who are located in the State of Texas covered by the jurisdiction of the Southern Conference Supplemental Agreement.

drivers by private firms in the trucking industry.[15] As the federal courts have thus become familiar with the practices in the trucking industry, a clear pattern has emerged: throughout much of the industry, trucking companies, and the unions representing drivers, have erected barriers to the movement of non-white/non-Anglo workers from pick-up and delivery jobs to the coveted road driver positions. The employment practices attacked in this suit—the no-transfer and seniority policies—are prevalent in the trucking industry. Typically, city drivers are not permitted to transfer to line driver jobs. Where they are, they are not generally permitted to carry over their seniority for job bidding and lay off purposes. The result is, at the very least, a strong disincentive for city drivers to transfer to the road. City drivers are thus effectively "locked in" their city driving jobs with no realistic possibility of transferring to line driving positions. Were there no more to the scenario, of course, the federal courts would likely have no concern; there is nothing per se illegal in no-transfer or separate seniority policies. But, as the courts have noted with some frequency, the policies often operate to perpetuate the effects of hiring discrimination. The overall result is a situation where in many areas of the country blacks and Mexican-Americans serve as city drivers, while road-driver fleets in private trucking firms, at least until very recently, have been virtually all-white/Anglo.[16] Thus it is that facially

---

[15] See, e. g., the cases cited in note 17 *infra*.

[16] Two recent studies have confirmed that Negroes and Mexican-Americans have been excluded from line driving jobs. One study found that, nationally, Negroes comprised only 2.4 percent of the over-the-road drivers for private trucking firms in 1968. Firms that employed more than 100 persons had only one-percent Negro road drivers. Leone, The Under-utilization of Negroes as Truck Drivers by For-Hire Motor Carriers, 22 Lab.L.J. 631, 633 (1971). Another Study, covering 329 trucking companies for the year 1970, found that Negroes comprised 2.7 percent of the companies' road drivers. In the same companies, Spanish-surnamed Americans made up only .8 percent of the road drivers. See Nelson, Equal Opportunity in Trucking: An Industry at the Crossroads (GPO 1971).

neutral no-transfer and seniority policies have come under a broad attack, for "[i]t is now beyond cavil that Title VII of the Civil Rights Act of 1964 proscribed employment practices and procedures which, although presently neutral and nondiscriminatory on their face, tend to preserve or continue the effects of past discriminatory practices". United States v. N. L. Industries, Inc., 8 Cir. 1973, 479 F.2d 354, 360. See Griggs v. Duke Power Co., 1971, 401 U.S. 424, 430, 91 S.Ct. 849, 28 L.Ed.2d 158; Pettway v. American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d 211, 236; Local 189, United Papermakers & Paperworkers v. United States, 5 Cir. 1969, 416 F.2d 980, 990-991, cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100.

A. *Discrimination by East Texas Motor Freight*

We begin by examining the past hiring patterns of ETMF. See United States v. Jacksonville Terminal Co., 5 Cir. 1971, 451 F.2d 418, 450, cert. denied, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815. Although the plaintiffs do not attack ETMF's road-driver hiring practices—and indeed stipulated that they are not now discriminatory—we must begin there. A pattern of past discriminatory hiring is essential to the plaintiffs' case. See Jones v. Lee Way Motor Freight, Inc., 10 Cir. 1970, 431 F.2d 245, 247, cert. denied, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237.

[13, 14] A prima facie case of discrimination may be established by statistical evidence, and statistical evidence alone. "The inference [of discrimination] arises from the statistics themselves and no other evidence is required to support the inference." United States v. Hayes International Corp., 5 Cir. 1972, 456 F.2d 112, 120. The statistics in the instant case are overpowering. East Texas Motor Freight has stipulated that prior to the date that Rodriguez filed a charge of discrimination with

the EEOC in 1970, ETMF had never employed a Negro or Mexican-American as a line driver in that portion of the State of Texas covered by the Southern Conference Area Supplemental Agreement. By the date of trial, two and a half years later, ETMF had hired three Mexican-Americans to join its Texas road driver force of approximately 180 drivers. By trial ETMF had still not hired a Negro road driver in Texas.

These figures establish a prima facie case of past discrimination in hiring. In other trucking cases the statistics have shown a similar pattern. In Jones v. Lee Way Motor Freight, Inc., 10 Cir. 1970, 431 F.2d 245, 247, for example, the Court summarized: "[T]here were no Negro line drivers; most whites were line drivers; and all Negroes were city drivers." Similarly, in Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687, 688, the Court noted: "All road drivers are, and always have been white; all Negro drivers are city drivers, though not all city drivers are Negro." The similarity between the employment situations in both *Bing* and *Jones* and that here is striking. In *Bing* and *Jones*, and in each of the cases cited in the margin, the court held that the statistics were sufficiently potent to constitute a prima facie case.[17]

---

[17] Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416 (At ETMF's Memphis terminal, all of the 105 road drivers were white. Of the 131 city drivers, 43 were black.); Witherspoon v. Mercury Freight Lines, Inc., 5 Cir., 1972, 457 F.2d 496 (No black had ever worked for Mercury Freight as a long haul driver.); Hariston v. McLean Trucking Co., M.D.N.C. 1973, 62 F.R.D. 642 (Of 479 over-the-road drivers at Winston-Salem terminal, nine were black.); United States v. Navajo Freight Lines, Inc., C.D.Calif. 1973, 6 FEP Cases 274 (No black or Spanish-surnamed road drivers until 1970); Sabala v. Western Gillette, Inc., S.D.Tex. 1973, 362 F.Supp. 1142 (Of 29 road drivers in Houston, 28 were white/anglo; one was Mexican-American. Of 65 drivers in Houston, 42 were either black or Mexican-American.); United States v. Lee Way Motor Freight, Inc., W.D.Okl. 1973, 7 EPD ¶ 9066 (940 road drivers were white, 14 were black, and 12 were other than white or black.); Sagers v. Yellow Freight System, Inc., N.D.Ga. 1972, 6 EPD ¶ 885 (In 1968 of 150 road drivers for Yellow Freight in the Southern Conference area, none were black. As of May 12, 1972, only 3.6 of Yellow Freight's road drivers in the Southern Conference Area were black).

[15] Once the plaintiffs established a prima facie case, the burden fell to the defendants to rebut the statistics or to explain the disparity in hiring.[18] See Rowe v. General Motors Corp., 5 Cir. 1972, 457 F.2d 348, 358. Having stipulated to the statistics, the defendants cannot, of course, dispute them. But the defendants do imply that the force of the statistical disparity is countered by the plaintiffs' stipulations that ETMF's qualification for road drivers are not discriminatory and that the plaintiffs were employed at the San Antonio terminal without regard to race or national origin. The defendants also argue that the plaintiffs have not shown that any members of the plaintiff class were qualified as road drivers. We reject these contentions.

[16, 17] First, only historical hiring practices are at issue here. Whatever the nature of present hiring practices,[19] they neither explain nor justify, without more, the past failure to hire minority line drivers. Without some proof presented by the defendants to the contrary, we must assume that the "lily white"/Anglo nature of the ETMF road driver fleet until 1970 resulted from discriminatory hiring practices.

[18] Second, we accord no weight to the stipulation that the named plaintiffs were not discriminated against when they were hired at the San Antonio terminal as *city* drivers. It was their inability to gain a *road* driver job with ETMF at any terminal in Texas that the plaintiffs decry.

---

[18] Although the union defendants are not responsible for ETMF's hiring policies, the case against the unions, like that against ETMF, begins with the showing of past hiring discrimination that originally operated to foreclose the road driver jobs to blacks and Mexican-Americans. See p. 1282, *infra*. The unions thus join ETMF in its effort to rebut the prima facie case of hiring discrimination.

[19] We do not accord the plaintiff's stipulation concerning present hiring practices the broad reading that the defendants do. See p. 1277, *infra*.

Finally, the defendants rely on language from McDonnell Douglas Corp v. Green, 1973, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, in which the Court said:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Nothing in this language is inconsistent with the accepted practice of federal courts' recognizing statistics as establishing prima facie case of employment discrimination. Sagers v. Yellow Freight System, N.D.Ga. 1973, 5 EPD ¶ 8885 at 5759. In *McDonnell Douglas* a black worker, laid off in a reduction-in-force, complained that he was not rehired because of his race and involvement in the civil rights movement. The Court emphasized that the "critical issue . . . concerns the order and allocation of proof in a private [*non-class-action*] challenging employment discrimination". 411 U.S. at 800, 93 S.Ct. at 1823. (emphasis supplied). Furthermore, the Court observed in a crucial footnote that the test outlined in the text of the opinion for a prima facie case "is not necessarily applicable in every respect to differing factual situations". 411 U.S. at 802, n. 13, 93 S.Ct. at 1824.

The present case differs in several significant respects from *McDonnell Douglas*. First, this is a class action. Equally important, the Supreme Court noted in *McDonnell Douglas* no history of past employment discrimination or any other factor that might have discouraged the respondent from applying for a job. Indeed, he had had a job with the company, and its

refusal to rehire him after his layoff formed the gravamen of the complaint. In contrast, at the time of Rodriguez's complaint to the EEOC, ETMF had never hired a black or Mexican-American line driver in the Texas-Southern Conference area. Given these past hiring practices, "it is not unreasonable to assume that minority persons [would] . . . be reluctant to apply for employment, absent some positive assurance that if qualified, they [would] in fact be hired on a more than token basis". Carter v. Gallagher, 8 Cir. 1972, 452 F.2d 315, 331 (en banc). It would be unrealistic to require the plaintiffs to show that blacks and Mexican-Americans applied for road driver jobs they knew they could not obtain. See Bing v. Roadway Express, Inc., 485 F.2d at 451; Jones v. Lee Way Motor Freight, Inc., 431 F.2d at 247. We note also another distinction. In *McDonnell Douglas* the respondent's qualifications were undisputed. He had held the job, and apparently served satisfactorily, before he was laid off. In the instant case, in contrast, the possibility of meeting one of the most important criteria for hiring—the road test—has been denied to the class of city drivers. Deprived of the opportunity to take a driving test, the plaintiffs could not prove they were qualified to become road drivers.

[19-22] Proof that the relevant labor pool lacks qualified minority persons may, of course, even in a class action, rebut a prima facie case of hiring discrimination. Congress did not intend that Title VII force employers to hire unqualified applicants of *any* race or ethnic background. Griggs v. Duke Power Co., 410 U.S. at 430, 91 S.Ct. 849; Sagers v. Yellow Freight System, Inc., 5 EPD at 5758. But it was EMF's burden to show that its history of hiring only white/Anglo line drivers resulted from a scarcity of available Negroes and Mexican-Americans qualified to serve in that position. United States v. Hayes International Corp., 456 F.2d at 120. ETMF has not met this burden.

The next steps in our analysis were clearly delineated by Judge Thornberry in *Bing:* "Once it had been established that an employer or union has discriminated in the past, then, the inquiry is twofold: (1) Does the present policy perpetuate the past discrimination? (2) Is the present policy justified by a showing of business necessity?" 444 F.2d at 690.

The conclusion is inescapable that both the no-transfer policy and the maintenance of dual seniority rosters, one for city drivers and one for line drivers, have perpetuated ETMF's past discriminatory hiring practices. Together, they have removed all realistic opportunity for transfer. Under the no-transfer policy a city driver wishing to transfer to road status must first resign his city driver position, with no assurance that he will be hired as a line driver, and no assurance that if he fails to be hired he will be rehired as a city driver. Even if the city driver were to become a road driver, because of the separate seniority rosters he would lose his accumulated competitive-status seniority. He would have the last choice of routes and would be the first laid off. And if laid off, he would have no "bumping" rights to recover his city driver job. "In any industry loss of seniority is a critical inhibition to transfer." 451 F.2d at 453. It is no surprise, then, that when the company temporarily relaxed in 1972 its no-transfer policy and its requirement that road drivers have three years line haul experience only five ETMF city drivers in the entire Southern Conference area took, qualified for, and held the road driver job. For a city driver with a significant amount of seniority the choice must have been a difficult one indeed. The named plaintiffs testified that they were unwilling to give up their city driving seniority to transfer to road driving jobs they otherwise desired. In the strictest sense, city drivers were "locked" into city driving jobs. The discrimination that removed the possibility that a Mexican-American or Negro could obtain a line driver job when first applying to the company was thus continued and perpetuated by the no-

transfer and seniority policies which prevented the city drivers from later transferring to road driver jobs.

We turn to the question whether ETMF has justified the no-transfer policy and seniority system by a showing of business necessity. The business necessity standard is strict.

> "[T]he 'business necessity' doctrine must mean more than transfer and seniority policies serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of past discrimination. . . . Necessity connotes an irresistable demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals. . . . If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued."

United States v. Bethlehem Steel Corp., 2 Cir. 1971, 446 F.2d 652, 662, cert. denied, 404 U.S. 959. "In other words, management convenience and business necessity are not synonymous." United States v. Jacksonville Terminal Co., 451 F.2d at 451.

[23] The business necessity test essentially involves balancing the need for the challenged practice or policy against its discriminatory impact. The business purpose must be "sufficiently compelling to override any racial impact"; it must "effectively and efficiently" carry out its business purpose; and there must be no acceptable alternative practice. Pettway v. American Cast Iron Pipe Co., 494 F.2d at 246; Robinson v. Lorillard Corp., 4 Cir. 1971, 444 F.2d 791, 798, cert. denied, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655.

[24] ETMF advances two justifications for its no-transfer policy. The company first contends that the no-transfer policy

is necessary to protect employees, property, and the general public. ETMF conjures up visions of an unqualified driver "hurtling through space, if you will, at 60 miles an hour with a rig of gross vehicle weight of 72,000 [pounds]".[20] While we do not underestimate the potential dangers raised by unqualified drivers, these can be effectively diminished and by carefully screening transferees.[21] See Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416; Bing v. Roadway Express, Inc., 444 F.2d at 691. The visions invoked by ETMF argue for continued strict qualifications for road drivers, but they are not sufficient justification for the no-transfer policy. Second, ETMF argues that as a driver-salesman the city driver's contact with customers is an important element in customer relations. The implication is that if city drivers are permitted to transfer, ETMF might lose customers. We must reject this contention also. Loss of city drivers by transfer is no more harmful to the company's pick-up and delivery business than loss for any other reason. We agree with the district court in Sagers v. Yellow Freight System, Inc., 6 EPD at 5760:

> The city driver's unique functions and skills may justify treating it as a separate job classification from that of road driver; it does not constitute an overriding business justification for denying qualified city drivers the opportunity to transfer to the road driver position where the latter position was initially closed to them on the case of race.

ETMF portrays its seniority system as preferred by the majority of black and Mexican-American city drivers. The company relies on the vote taken at the membership meeting of Local 657 where a majority of the blacks and Mexican-Amer-

---

[20] Brief for Appellee East Texas Motor Freight 33, quoting testimony of H. L. Johnson, President of ETMF.

[21] ETMF has a continuous training program for road drivers, which includes on-the-job training. The training program was accelerated after the no-transfer system was temporarily modified in 1972.

icans rejected a proposal to merge city and road seniority rosters. "It is obviously good personnel management", argues ETMF, to honor the preference of its Mexican-American and black employees. Furthermore, the company hints, if it had acted to merge the seniority lines, it might have been subject to legal action by those blacks and Mexican-Americans who desired dual lists, contending that the merger constituted a violation of Title VII. See Graham v. Missouri-Pacific Truck Lines, S.D.Tex.1973, [C.A. 71-11-1229, Feb. 2, 1973]. Whatever the merits of this argument as is couched by ETMF, when relief is viewed in terms other than a merger of seniority lines, such as a once-only transfer by city drivers to line jobs with seniority carryover, any force behind the contention evaporates. ETMF's explanations do not meet the question why those blacks and Mexican-Americans who have desired to transfer have not been permitted to do so and to carry over their competitive-status seniority. Nor is it explained how permitting those city drivers to carry over their seniority would hurt other city drivers or be objectionable to them.[22]

---

[22] ETMF might have argued that to permit city drivers to carry over their seniority to road driver jobs would have been in violation of its contract with the local unions representing the line drivers, not parties to this case. Certainly the company might have anticipated some difficulty from those quarters, for permitting carryover of seniority into road jobs would put transferees ahead of some road drivers in seniority. Neither the threat of union difficulty nor the possibility that giving transferees seniority on the road driver roster would violate ETMF's contract with the road driver locals, however, would have provided a sufficient justification for refusing to give transferees seniority. Labor unrest stemming from interference with the expectations of whites was found not to amount to a business necessity in United States v. Bethlehem Steel Corp., 2 Cir. 1971, 446 F.2d 652, Robinson v. Lorillard Corp., 4 Cir. 1971, 444 F.2d 791, 798-799 and Local 189, United Papermakers and Paperworkers, 5 Cir. 1969, 416 F.2d 989. Furthermore, difficulties caused by the fact that city and road drivers were covered by different union contracts was rejected as a business necessity in Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687, 691, and Jones v. Lee Way Motor Freight, Inc., 10 Cir. 1970, 431 F.2d 245, 250.

[25] The company finally contends that the plaintiffs have nevertheless failed to establish liability, because they have not shown that any of the plaintiff class meets ETMF's road driver qualifications. The argument is in essence that if members of the plaintiff class of city drivers cannot qualify for road driver jobs, how can it be said that it is the no-transfer and seniority policies that lock them in city jobs? Rather, the argument continues, city drivers are locked in by their inability to qualify for the sought-after line driver jobs, and ETMF is under no obligation to permit city drivers to transfer to line driver jobs for which they are unqualified.

ETMF would have us reverse the burden of proof, placed firmly on the defendant by the plaintiffs' prima facie case of past hiring discrimination perpetuated by facially neutral practices and policies. We stated earlier that the burden rested on the defendants to show that the failure to hire minority persons as road drivers resulted from an absence of qualified minority drivers available. So too we think the burden must remain on the defendants to prove that the discrimination shown by the plaintiffs' prima facie case is not perpetuated by present policies in that no minority city drivers are now qualified to transfer to road driver jobs. To our knowledge no court has hinged a finding of liability in a trucking case on proof that the plaintiff class of city drivers contains those qualified to assume road driver responsibilities. That some of the class will be found qualified to transfer when the discriminatory restrictions are removed has been uniformly assumed. Winnowing the qualified from the unqualified has been left to the remedy stage; only those city drivers wishing to transfer who meet objective and nondiscriminatory standards of the company are, in the final analysis, entitled to relief.

We agree with this approach. It is not the failure to hire as a line driver every city driver who would like to transfer to the road that forms the gist of the complaint in cases like the

one before us. It is the policies of the company which discourage and prevent transfer regardless of qualifications that are under attack. In sum, we are of the opinion that ETMF had the burden of proving that none of the plaintiff class was qualified to transfer to the road.[23] It was not the burden of members of the plaintiff class to establish their qualifications before a case of discrimination could be made.

We recognize that by a literal reading of ETMF's road driver requirements, none of the plaintiff class of city drivers could qualify for a road driver job. No present city driver has three years' "*immediate* prior line haul experience". Nor, we assume, do many city drivers have three years' experience on the road, gained at any time; the spate of trucking cases that have been marched through the federal courts give clear indication of the difficulty that blacks and Mexican-Americans have had nationwide obtaining road driver jobs with private trucking firms. We do not, however, accept the criteria ETMF employs in determining whom to hire as road drivers. ETMF's road driver requirements must be read against the business necessity test. That standard, always stringent, requires that we scrutinize requirements of experience when that experience has been discriminatorily denied.

[26] Although requiring experience at a particular job is neutral and job-related on its face see Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1145 (1971), it is discriminatory to require experience as a prerequisite to employment when the experience is unavailable to minority persons. Blumrosen, Seniority and Equal Opportunity: A Glimmer of Hope, 23 Rut.L.Rev. 268, 309 (1969). We have in this Circuit approved a lower court's striking down an experience require-

---

[23] Ezra Bierle, dock foreman at ETMF's San Antonio terminal, testified that from 1968 or 1969 the tractor-trailer equipment driven by city and road drivers has been essentially the same.

ment as a criterion of membership in a labor union when "negroes were prevented from gaining such experience due to the union's racial discrimination". Local 53, International Association of Heat & Frost Insulators & Asbestos Workers v. Vogler, 5 Cir. 1969, 407 F.2d 1047, 1054-1055; see also United States v. Sheet Metal Workers, Local 36, 8 Cir. 1969, 416 F.2d 123; Dobbins v. Local 212, International Brotherhood of Electrical Workers, S.D.Ohio 1968, 292 F.Supp. 413. More significantly, we held in United States v. Jacksonville Terminal Co., 451 F.2d at 453, that where blacks were prevented by racial discrimination from utilizing their skills in the railroad industry, experience as a job criterion could not properly be confined to *railroad* experience. We do not imply that all experience requirements that act to perpetuate discrimination are illegal; only that they are illegal unless justified as a business necessity. And, as we have said, ETMF has not proved that three years' immediate line-haul experience is a business necessity for transfer of its city drivers to line-haul duties.

[27] The defendants place great reliance on the plaintiffs' stipulation that "[t]he standards and qualifications of East Texas Motor Freight for its road drivers are not discriminatory". The defendants argue that, rather than conceding only that the criteria are facially neutral, the stipulation waived any argument that the road driving requirements have a disparate impact and discriminatory effect. We do not accord the stipulation such a prominent position in this suit. As we have noted, ETMF's criteria for road drivers automatically exclude all members of the plaintiff class, including the named plaintiffs. No city driver now employed can have three years' *immediate* prior line haul experience. And none of the named plaintiffs, at least, has three years' experience road driving gained at any time. By the defendants' reading of the stipulation, therefore, the plaintiffs have disqualified themselves from the very relief they seek most urgently—transfer to road driver jobs. We cannot accept the interpretation that the plaintiffs, represented by

counsel conceded by the defendants to be experienced Title VII attorneys, stipulated away their right to relief on the eve of trial.

In conclusion, the plaintiffs established an unrebutted prima facie case against ETMF of past hiring discrimination. It is manifest that the harmful effects of this past discrimination have been transported into the present through ETMF's facially neutral no-transfer and seniority policies. No compelling business necessity has been offered to justify ETMF's policies. In our view the district court's finding that ETMF did not discriminate against the named plaintiffs, or by implication the plaintiff class, is clearly erroneous. ETMF must be held to have violated 42 U.S.C. § 2000e-2[24] and 42 U.S.C. § 1981.[25]

B. *Discrimination by Local 657 and the Southern Conference*

The plaintiffs contend also that Local 657 and the Southern Conference of Teamsters have acted to perpetuate the discrimination against the plaintiff class of city drivers by creating collective bargaining agreements that establish separate seniority rosters for road and city drivers without provision for seniority carryover for minority city drivers who desire to transfer to road jobs. Before examining the substance of this contention, we pause to outline in more detail the manner in which the collective bargaining agreement between ETMF and Local 657 came into being.

Although the collective bargaining agreement is a contract between ETMF and Local 657, it is the product of negotiation on a national and regional scale. First, there is the National Master Freight Agreement, negotiated on a nationwide basis between the Trucking Employers, Inc. and the National Over-the-Road and City Cartage policy and Negotiating Committee

---

[24] See note 1, *supra*.

[25] See note 2, *supra*.

of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The National Negotiating Committee represents the local unions; the locals give powers of attorney to permit the National Negotiating Committee to act on their behalf. Although the Master Agreement must be ratified by the locals, ratification is generally a formality. Once the agreement is accepted by a majority of the local unions, it goes into effect and binds all locals.[26] The Master Agreement covers both city and road drivers. Then there are the Supplemental Agreements. Like the Master Agreement, although Supplemental Agreements are signed and administered by each local union at each terminal, "they are negotiated on an areawide basis by Local representatives of employees of all unionized trucking companies in that area". United States v. Pilot Freight Carriers, Inc., M.D.N.C. 1972, 54 F.R.D. 519, 521. In our case the Supplemental Agreements were negotiated by the Southern Conference of Teamsters. From these negotiations came, so far as we are now concerned, two separate agreements, one covering road drivers and one covering city drivers. The agreements provide for seniority to run from the date of entry into a particular collective bargaining unit. At the terminal level, these separate agreements are administered by union locals. In the case before us, the city drivers for ETMF in San Antonio are represented by Local 657. Local 657 is an integrated union. Since 1952 a majority of the employees working for ETMF within the jurisdiction and membership of Local 657 have been blacks and Mexican-Americans.

[28] As we mentioned earlier, it is the creation and maintenance of separate seniority rosters for road and city drivers

---

[26] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Constitution, art. XVI, § 4 (1966). "While there is a separate formal contract between each local union and [the defendant company] in effect, the National Master Freight Agreement is published in pamphlet form and accepted nationwide, with a blank in which the number of each individual local union is inserted." Sagers v. Yellow Freight System, Inc., N.D. Ga. 1972, 58 F.R.D. 54, 57.

without provision for seniority carryover by minority city drivers that forms the crux of the complaint against the union defendants. We agree with the plaintiffs that the discrimination against the black and Mexican-American city drivers that closed out the possibility of their being hired originally as road drivers was continued and reinforced by union action and inaction. For their role in continuing the effects of this discrimination the union defendants must share the blame and the liability.

We recognize that the prima facie case against ETMF for discrimination in the hiring of road drivers falls only indirectly against the union defendants. The company has always exercised full responsibility for hiring; the unions have never exercised any. We have discussed how the inability of city drivers to carry over their competitive-status seniority formed an important link in the chain that "locked" minority drivers into city driver jobs. Of this the unions were not aware. Local 657 concedes in its brief that the "most important thing to an employee working under a collective bargaining agreement, except perhaps for wage rates, is his seniority".[27]

[29] The plaintiffs' prima facie case of hiring discrimination, and proof that the seniority system, a creature of the collective bargaining agreement, transmitted the discrimination into the present, shifted the burden to the defendant unions to show that the present discriminatory effects were unavoidable, that is, required as a business necessity.

[30] The primary justification offered by the union defendants is that in contributing to the establishment of separate seniority rosters they were merely following the desires of the majority of their black and Mexican-American members. Once again the defendants rely on the post-trial defeat by members of Local 657 of a proposal to merge city and road driver contracts as an indication of the preferences of a majority of Mexi-

---

[27] Brief for Appellee Teamsters Local Union 657, at 16.

can-American and black city drivers. As we mentioned earlier, the degree to which the vote should be taken to represent the true desires of members of the plaintiff class is uncertain. In any event, the unions perceive their responsibility too narrowly. There are established ways to eliminate the lock-in effect of separate seniority rosters without merging rosters and jeopardizing the seniority rights of those city drivers who remain in their positions. Most obviously, seniority carryover can be allowed on a one-time-only basis for qualified minority city drivers who wish to transfer to the road. See, e.g., Thornton v. East Texas Motor Freight, supra; Bing v. Roadway Express, Inc., 485 F.2d 441; United States v. Central Motor Lines, Inc., W.D.N.C. 1971, 338 F.Supp. 532. No reciprocal arrangement for road drivers would have been necessary, because they have suffered no discrimination. See United States v. Chesapeake & Ohio Ry Co., 4 Cir. 1972, 471 F.2d 582, 593. We believe a one-time-only transfer with seniority carryover was an alternative that could have eased the discriminatory effects of the separate seniority lists without injury to any minority city driver. This reasonable alternative vitiates the business necessity defense. See United States v. St. Louis-San Francisco Railway Co., 464 F.2d 301 at 308; Robinson v. Lorillard Corp., 444 F.2d at 798.

For their role in establishing separate seniority rosters that failed to make allowance for minority city drivers who had been discriminatorily relegated to city driver jobs, Local 657 and The Southern Conference must be held accountable. They have violated 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981. The district court's finding to the contrary is clearly erroneous.

IV

Remedy

A. *Transfer*

[31] Because the district court concluded that the defendants were not liable under Title VII or 42 U.S.C. § 1981, it never reached the question of remedy. We remand for the court's consideration of this issue. The district courts have broad remedial powers to eliminate the present effects of past discrimination, and a large measure of discretion in modeling a decree. Local 53, International Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d at 1052. The discretion is not unbridled, however, and we provide the boundaries within which the decree in this case must be drawn.

[32, 33] We have long subscribed in this circuit to the theory that those who suffer discrimination under Title VII must be permitted to take their "rightful place" when job openings develop. As we said in Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d at 988:

> The Act should be construed to prohibit the *future* awarding of vacant jobs on the basis of a seniority system that "locks in" prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation.

See Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv.L.Rev. 1260 (1967). Thus, black and Mexican-American city drivers, many of whom would now be road drivers but for the discrimination of the defendants, must be given an opportunity to transfer to the road as road driving job openings develop.

ETMF need not permit unqualified plaintiffs to transfer to the road, but in determining who is qualified ETMF must use criteria that either have no disparate impact along the lines of race or national original, or that can be justified as a business necessity. We have already stated that the requirement of three years prior road haul experience must give way. Because road driving experience has been denied to blacks and Mexican-Americans as a class, and because ETMF has not justified the experience requirement as essential, it may not be confined to road driving when to do so would discriminate against members of the plaintiff class. ETMF having failed to prove that three years' line-haul experience is a business necessity for transfer, each city driver must be considered to meet the experience requirement by showing three years of city driving on equipment similar to that used over the road.

[34, 35] The plaintiffs argue that, because not all trucking companies require three years experience, we should also reduce the number of years experience required. See, e. g., Bing v. Roadway Express, Inc., 485 F.2d 441 (1 year); Sayers v. Yellow Freight System, Inc., N.D.Ga. 1973, 6 EPD ¶ 8885 (2 years). Once the requirement of *road* experience is removed, however, the experience requirement is not only *facially neutral*, it is *neutral in effect*. Thus it need not be justified as a business necessity. Congress did not intend that Title VII lead to uniform hiring practices across an industry. So long as hiring policies do not discriminate. Title II does not require their modification.

[36] We hold, not that all minority city drivers with three years' experience at city driving must be permitted to transfer, but only that they may not be excluded unless they fail to meet other qualifications that either have no disparate impact along racial or national-origin lines or that can be justified as essential for safety or efficiency. On remand the district court

should monitor carefully the criteria used by ETMF to prevent minority city drivers from transferring to line driving jobs.[28]

To permit minority city drivers the opportunity to return to their "rightful place" in the road driver ranks, the plaintiff class should be divided into sub-classes, one for each terminal in the Texas-Southern Conference area where ETMF domiciles road drivers. ETMF's system of terminal-based responsibility for hiring and of domiciling road drivers only at certain terminals is not discriminatory, and we leave these practices intact. Still, we are not blind to the recognized mobility of today's minorities. See, e. g., Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 at 1371. We may not assume that blacks and Mexican-Americans who became city drivers at a terminal where road drivers were not domiciled would not have moved to a terminal where road drivers were domiciled had a road driver job been open to them. Therefore, those members of the class who now work in terminals where road drivers are not domiciled must be permitted to join the sub-class of their choice. In other words, they must be provided an opportunity to become road drivers at one of the terminals where ETMF domiciles road drivers. Black and Mexican-American city drivers at terminals where road drivers are domiciled should be placed in the sub-class corresponding to that terminal. We may assume that they are already at the terminal they would have chosen had road driver jobs been open to them in the past.

Within each sub-class, minority city drivers should be permitted the opportunity to transfer as jobs become vacant at

---

[28] While the in-cab road test is undoubtedly a legitimate method for determining the qualifications of a driver, it may be subject to abuse unless the chances of a subjective judgment by the tester are minimized. See, e. g., United States v. Central Motor Lines, Inc., W.D.N.C. 1971, 338 F.Supp. 532, 563. Moreover, a potential transferee who performs inadequately on this test should not be disqualified unless he cannot be expected to improve sufficiently given normal training.

that terminal. The minority city drivers should be ranked in the various sub-classes according to their "qualification dates", described below. The ranking should determine the order in which opportunities to transfer are awarded.

[37] Over objection at trial, the district court admitted evidence pertaining to the qualifications of the named plaintiffs to become road drivers. The court then found that Rodriguez, Perez, and Herrera were unqualified. In light of the fact that the company admitted by stipulation that it did not consider any of the plaintiffs for employment as road drivers, we believe that the district court's action was premature. The question with regard to the named plaintiffs was not whether they were qualified, but whether ETMF's failure to consider their applications was discriminatory. On remand, the district court should require ETMF to consider the plaintiffs for road driver positions as vacancies occur. The court should supervise carefully the standards used by ETMF to determine whether the plaintiffs are in fact qualified, and should view with particular skepticism any reliance by ETMF on disciplinary actions taken by the company after the plaintiffs initiated their actions with the EEOC.

B. *Seniority Carryover*

[38] Members of the plaintiff class who transfer to the road must be permitted to take with them seniority for job bidding and lay off purposes. The question is "how much?" In general terms, the answer is that "how much seniority the transferee deserves should be determined by the date he would have transferred but for his employer's discrimination." Bing v. Roadway Express, Inc., 485 F.2d at 450. There is no way to arrive at such a date with exactitude, however, and some method for approximation is necessary.

In *Bing* we approved a "qualification date" formulation—the date a transferee had the experience necessary to qualify him

for a road driving job. 485 F.2d at 451.[29] The *Bing* test represents a compromise between the trial court's determination in that case that seniority rights should date from when the transferees applied to become road drivers, and the remedy requested by the Government as amicus, that transferees should carry over full company seniority. This Court felt, on the one hand, that the application-date formulation of the district court failed "to account for the realities of entrenched employment discrimination", 485 F.2d at 451; the company defendant's discriminatory practices discouraged city drivers from applying. On the other hand, the Government's theory of full seniority carryover would have given super-seniority to those transferees who were not qualified to be road drivers before they began working for the defendant. Until they were qualified, "discrimination could not have blocked their employment as road drivers". *Id.*

The *Bing* qualification-date formulation was rejected recently by a divided panel of the Sixth Circuit. In Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416, a case involving the same trucking company that is a defendant in the instant case, the Court affirmed the district court's grant of seniority carryover dating from six months after the transferee requested transfer or filed a charge with the EEOC. Although the Court distinguished *Bing* on the grounds that more charges were filed with the EEOC in *Thornton* (thus apparently showing that "silence and futility of protest" were less the norm), the

---

[29] In this case the qualification date of a member of the plaintiff class of city drivers is the date when, in the employ of ETMF, the individual first accumulated three years combined road and city driving experience gained either with ETMF or with other organizations. If the individual already possessed such experience when hired by ETMF, of course, his qualification date will be the same as his company seniority date.

Similar to *Bing*, the straight qualification-date calculation must be modified to take account of that period from October 1969 to March 1971, during which ETMF did not hire any road drivers. The seniority of any member of the plaintiff class whose qualification date falls within the period when ETMF did no hiring must date from March 1970, when ETMF resumed hiring.

Court also criticized the *Bing* rationale: "The rationale in *Bing* was that silence might be caused by a belief in the futility of a transfer request. That may be true, but also it may be caused by no desire to transfer." 497 F.2d at 421. The Court also noted that "there is something to be said for rewarding those drivers who protest and help to bring rights to a group of employees who have been victims of discrimination". 497 F.2d 420.

We are unpersuaded by these considerations. First, we think that the best indication whether a person desired transfer to the road in the past is reflected in whether he desires transfer now, so long as we do not create special incentives or disincentives that skew the balance. The qualification-date test of *Bing*, by taking into account experience requirements on the one hand and the effects of entrenched discrimination on the other, is as neutral as any we can envision. Second, the concern showed by the *Thornton* majority for rewarding those who help to bring rights to a group of employees was adequately answered by Judge Phillips, dissenting in part: "Any such 'reward' should not be at the expense of the other victims of the discrimination. Title VII was enacted to protect *all* employees from unlawful discrimination. This is especially true where the discrimination intimidated the employees to such an extent that they felt it would be futile to request a transfer." 497 F.2d at 428. In short, we reaffirm the qualification-date formulation of Bing.[30]

---

[30] The Circuit recently required that transferees in a trucking case similar to this one be permitted use of "full company seniority" in their new positions. Franks v. Bowman Transportation Co., 5 Cir. 1974, 495 F.2d 398, 416. The Court emphasized, however, a critical difference between that case and *Bing*: "In [*Bing*], Roadway had a flat requirement of one year's experience for road drivers, so that the qualification date was easily calculable. To allow the use company seniority before that date would have placed the discriminatee in a better position than he could have achieved without the discrimination. In this case, by contrast, Bowman had no rigid one-year experience requirement. It sometimes accepted OTR [over-the-road] trainees with little or no prior driving experience." *Id.* 495 F.2d at 417 n. 17. As in *Bing*, the qualification date in the instant case is easily calculable. The three-years experience requirement has been rigidly adhered to.

C. *Back Pay*

The district court should consider the question of back pay, with particular reference to the guidelines laid down in Pettway v. American Cast Iron Pipe Co., 494 F.2d at 251-263; Johnson v. Goodyear Tire & Rubber Co., 491 F.2d at 1375-1380; and Bing v. Roadway Express, Inc., 485 F.2d at 452-455. In these cases the criteria for the award of back pay, and the method of calculation, have been thoroughly analyzed. The most difficult question remaining before the district court will be the apportionment of the burden of paying any back pay awards among the three defendants. Consistent with the broad discretion awarded the district court on this question in Johnson v. Goodyear Tire & Rubber Co., 491 F.2d at 1382, we intimate no view to this question.

V

The Consent Decree

On June 29, 1972, the United States filed a "pattern and practice"[31] suit in the Northern District of Texas against ETMF, the Teamsters International, and the International Association of Machinists and Aerospace workers, challenging nationwide essentially the same practices at issue in the instant private class action. February 19, 1974, approximately one month before we heard oral argument in the case before us, the parties to the Government's suit entered into a consent decree. The decree covered:

> A. Such black or Spanish-surnamed city drivers, hostlers, checkers and garage employees who are domiciled at a terminal where road drivers are presently domiciled or where road drivers have been, since July 2, 1965, domiciled under either ETMF or a predecessor company.

---

[31] See 42 U.S.C. § 2000e-6.

B. Such persons who are incumbent city employees employed at a non-road driving terminal who have, since July 2, 1965, indicated a desire to transfer to the road.[32]

In addition to setting some standards for hiring and establishing hiring ratios, the decree established "transfer procedures". City drivers were to be afforded 30 days "to indicate an interest in transferring to the road driver classification at the terminal in which he is employed (if that terminal has an over-the-road operation) or at a terminal within the job market, or to a terminal of his choice (if the terminal at which he is employed has no over-the-road operation) . . ." The issue of seniority rights was left for later resolution. The decree provided also that ETMF was to furnish a total of $175,000 as back pay compensation for members of the affected class nationwide. Persons accepting a portion of this settlement were to sign a release "stating that such designated portion is accepted in full and final settlement of all claims for monetary compensation, back pay or any other type of relief against ETMF or any predecessor corporation based upon any pending litigation or other alleged discriminatory actions because of race or national origin occurring prior to the date such release is signed".

[39, 40] A judgment by consent binds the parties and those in privity with them. Seaboard Air Line Railroad Co. v. George F. McCourt Trucking, Inc., 5 Cir. 1960, 277 F.2d 593. Members of the plaintiff class in the present action were neither parties to the Government's suit, nor do they have interests in privity with the Government. See Williamson v. Bethlehem Steel Corp., 2 Cir. 1972, 468 F.2d 1201, 1203, cert. denied, 411 U.S. 931, 93 S.Ct. 1893, 36 L.Ed. 390; *cf.* Trbovich v. United Mine Workers of America, 1972, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686.

We hold, therefore, that the consent decree does not operate as collateral estoppel to prohibit any members of the plaintiff

---

[32] The decree also covered some named individuals.

class from participating in relief in this case See also IB J. Moore, Federal Practice ¶ 0.411[1] (2d ed. 1974). Those members of the plaintiff class who accept compensation under the consent decree and sign a release, of course, are bound by the terms of the release. But no other members of the plaintiff class lose any right to relief in the instant case.

We have chosen not to accord the consent decree any great weight in our outline of the relief to be awarded by the district court. First, the "affected class" awarded relief in the consent decree does not encompass an important segment of the plaintiffs' class here—black and Mexican-American city drivers at "non-road driving" terminals in the Texas-Southern Conference area who have not "indicated a desire to transfer to the road". The Government's remedy is thus based inplicitly on the theory, one we reject, that the acceptance by a black or Mexican-American of a job as a city driver at a city-only terminal, at a time when no road positions were open to him, signifies a lack of interest in a road driver position. Rather, we have taken cognizance of both the mobility of the modern work force and the reality of entrenched employment discrimination that makes a request to transfer a futile gesture. Second, private plaintiffs in class actions under Title VII and the United States in "pattern and practice" suits protect different interests: the Government protects general economic interests in addition to the rights of minorities; private plaintiffs represent only the interests of minority group members. United States v. Local No. 3, Operating Engineers, N.D.Calif.1972, 4 FEP Cases 1088, 1093. While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution. Finally, we cannot ignore the possibility that, if we permit negotiated settlements by the Government to control the relief accorded in pending private actions against the same plaintiffs, private actions will be significantly discouraged. Such a result would have a deleterious

effect on enforcement of Title VII and would not, in our opinion, be consistent with the intent of Congress.

We are not unmindful of the argument that by going beyond the relief awarded by the consent decree we may discourage defendants in "pattern and practice" suits from entering into settlements with the United States when a Title VII private class action is proceeding simultaneously against the same defendant. The court in *Local No. 3, Operating Engineers* expressed a similar concern: "If the United States cannot offer a final settlement in cases where a pattern and practice suit is proceeding simultaneously with a class action, then the Government's bargaining power will be severely reduced". 4 FEP Cases at 1093. Our worries are eased, however, as were those of the court in *Local No. 3, Operating Engineers*, by the Government's support of the broad class relief outlined in the opinion. As amicus curiae in this case, the EEOC has filed a post-argument brief arguing that "those who elect not to take under the consent decree, as well as those who are not covered by the decree, should have an opportunity to pursue vindication of their rights through this private litigation".[33]

The case is reversed and remanded for proceedings consistent with this opinion.

---

[33] Supplemental Brief for the United States Equal Employment Opportunity Commission as Amicus Curiae 4.

APPENDIX C

In the District Court of the United States for the
Western District of Texas
San Antonio Division

Ernest Herrera, et al.

v.

Yellow Freight System, Inc., et al.

Civil Action No.
SA-71-CA-296

Findings of Fact and Conclusions of Law

On the 22nd day of January, 1973, came on to be heard the above entitled and numbered cause for trial on the merits, and both parties appeared in person and by their Attorneys of Record and announced ready for trial, whereupon the Court proceeded to hear the evidence from the witnesses and oral arguments of counsel and at the conclusion of the trial and after consideration of all the pleadings, the evidence adduced by both parties, the arguments of counsel and applicable law, the Court hereby makes its Findings of Fact and Conclusions of Law.

Findings of Fact

1. This Court has jurisdiction of this action by virtue of Title 42, U.S.C., Section 2000e-5(f) and Title 28, U.S.C., Section 1343 (4) providing a cause of action under Title 42, U.S.C., Section 1981.

2. The plaintiffs are employees of the defendant truck line and members of the defendant Union and its affiliates (Local 657 of the Southern Conference of Teamsters and the International Conference of Teamsters). Plaintiffs are all Mexican-American

residents of the United States and residents of San Antonio, Bexar County, Texas. The defendant truck line is a corporation doing business in the State of Texas and the City of San Antonio and operates and maintains a local city-wide freight terminal and a city-wide trucking service in San Antonio, Bexar County, Texas and is an employer within the meaning of Title 42, U.S.C., Section 2000e-(b). The defendant Union and its affiliates are the representatives and bargaining agents of the plaintiff employees on an international, regional and local basis.

3. All plaintiffs were hired by the defendant truck line as regular city pick-up and delivery drivers on the dates set out herein and have remained in that capacity to the present time.

Ernest Herrera—July, 1965

Mario Melchor—October, 1964

Trine Uribe—October, 1964

4. It is stipulated that none of the plaintiff employees were discriminated against as to their original employment.

5. The defendant truck line does not have any road drivers domiciled in San Antonio, Bexar County, Texas and the San Antonio terminal is operated solely as a local, city-wide pick-up and delivery service.

6. On April 1, 1970 the defendant truck line and the defendant Union entered into the National Master Freight Agreement and Southern Conference Area Local Freight Forwarding Pick-up and Delivery Supplemental Agreement (hereinafter referred to as "Union Contract") which expires June 30, 1973 and the terms and conditions of which are fully known and understood by the plaintiff employees. The plaintiff employees have ratified this contract and prior similar contracts since the time of their employment.

7. The provisions of the Union Contract providing for job transfer from a city driver to a road driver and vice versa, including the provision for separate seniority lists for city and line drivers, apply to all job applicants and employees regardless of race or qualifications.

8. The defendant truck line's policy and regulations regarding job transfers are generally:

(a) The applicant must relinquish his current position;

(b) The applicant must make written application for a new position at terminal location where the job is sought;

(c) The applicant must be willing to relocate at the new terminal location;

(d) For a road driver job, applicants must pass certain standardized Department of Transportation tests and company tests (driving and physical); and

(e) The applicants must have certain road driving experience.

These regulations are not unreasonable and apply to all job applicants and employees regardless of race or qualifications. The fact that each terminal is autonomous as concerns the employment of drivers is proper and in accordance with accepted business practices.

9. The plaintiff employees testified that they were unwilling or at least ambivalent to comply with the job transfer requirements even when confronted with a hypothetical opportunity to make the job change under the existing regulations "tomorrow" assuming a position was available. Thus, plaintiffs' objections are not grounded on lack of job availability, but rather on the stringency of the regulations.

10. None of the plaintiffs have ever made written application for a position as road driver. Plaintiff Uribe's application

is not considered to be in full compliance with regulations and company policy in applying for this position.

11. The defendant truck line employs a majority of Mexican-Americans and Negroes in all phases of its San Antonio Terminal operation and there has been no showing of discrimination as regards the hiring practices of that office.

12. The plaintiff employees have never filed a discrimination grievance charging a violation under Article 38 of the Union Contract, but originally filed a Complaint with the Equal Employment Opportunity Commission.

13. The plaintiff employees have never availed themselves of participating in the contract amendment negotiation meetings at the local Union level in an effort to change the job transfer requirements.

14. The plaintiff employees have not been discriminated against by their Union as the Union is comprised of a majority of Mexican-Americans and Negroes and every member is free to participate in the contract negotiating process and to vote on every issue or contract presented to the membership.

15. When the plaintiff employees inquired from various supervisory personnel at the San Antonio Terminal as to the method of securing a road driving position, they were not discouraged nor misled, but rather the requirements were explained (i.e. they would have to make application at the road driving terminal location, etc.) and the plaintiffs chose not to make application. The failure of the plaintiff employee to secure a road driving position was due to a lack of diligence on their part, an unwillingness to give up their city driving seniority, and an inability to meet the job qualifications rather than actual racial discrimination by either the defendant truck line or the defendant Union.

16. None of the plaintiff employees could satisfy all of the qualifications for a road driver position according to the company manual due to age or weight or driving record. The qualifications apply universally to all job applicants and employees and are not in any manner racially discriminatory.

17. Both the defendant truck line and the Union defendants are bound by the contracts in that neither can unilaterally change the contract provisions by allowing a merger of seniority lists, a transfer of seniority or in any other manner attempting to alter, combine or discard the provisions of the separate contracts for city and road drivers without subjecting themselves to economic or other negative sanctions by the non-offending party.

18. Refusal by the defendant truck line to permit job transfers without loss of terminal seniority or to maintain separate seniority lists is a reasonable and proper business practice and in accordance with the Union Contract and in no manner causes, perpetuates or results in discriminatory practices by any of the defendants.

19. The fact that there are separate Union Contracts and job qualifications for city and road drivers is reasonable both as an accepted business practice and by the fact that the National Labor Relations Board recognizes the two job groups as separate bargaining units.

20. The defendant truck line did not prevent or discourage the plaintiff employees from seeking or securing a road job transfer nor from making written application for said position because of their race or because they filed a Complaint with the Equal Employment Opportunity Commission, or for any other reason.

21. The defendant truck line and Union did not discriminate against the plaintiff employees because they made a charge or indicated they would make a charge against the defendants to the Equal Employment Opportunity Commission.

22. The defendants did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise.

23. While not compelling, further evidence of the continuing desire of the vast majority of the local Union membership is contained in the Affidavit of R. C. Shafer, President and Business Manager of the local Union, and George Hardeman, Jr., Recording Secretary of the local Union, filed February 23, 1973 and stipulated to by the parties to this suit by Stipulation filed March 6, 1973. The Affidavits show that at the Union Membership meeting on February 11, 1973, after the trial of this case was completed, the employees of the defendant truck line, and others, rejected proposals that the next City and road driver contracts be merged and that both job classifications be permitted to transfer to the other with company seniority for all purposes. A further proposal to the effect that the seniority of the employees working for the freight lines remain as it is in the current contracts was approved by a vote in excess of two to one.

Conclusions of Law

1. I conclude as a matter of law that none of the defendants violated Title 42, United States Code, Section 2000e-5 or any section of Title 42 relating to race discrimination.

2. I further conclude as a matter of law that the plaintiffs, and each of them, take nothing by reason of their suit and that the defendants and each of them are entitled to judgment.

3. I further conclude that the defendants, and each of them, recover their court costs incurred herein against the plaintiffs.

Entered this 22nd day of March, 1973, at San Antonio, Texas.

/s/ JOHN H. WOOD, JR.
United States District Judge

APPENDIX D

Ernest Herrera, et al.,
Plaintiffs-Appellants,

v.

Yellow Freight System, Inc., et al.,
Defendants-Appellees.

No. 73-2254.

United States Court of Appeals,
Fifth Circuit.

Nov. 25, 1974.

Mexican-American city truck drivers brought employment discrimination action challenging motor carrier's "no-transfer" policy and maintenance of separate seniority rosters for city and road drivers, which conduct allegedly resulted in plaintiffs being discriminatorily "locked-in" to their city driver jobs without realistic opportunity for transfer to higher paying road job positions. The United States District Court for the Western District of Texas, John H. Wood, Jr., J., found no discrimination and plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that plaintiffs established prima facie case of hiring discrimination perpetuated by racially neutral "no-transfer" and "no-seniority-carryover" policies of carrier and union organizations, and that discriminatory effects of policies was not justified on ground of business necessity.

Reversed and remanded.

1. Civil Rights Key 44(1, 4)

Mexican-American city truck drivers established prima facie case of hiring discrimination with respect to more lucrative road driver positions and of perpetuation of such discrimination by racially neutral "no-transfer" and "no-seniority-carryover" policies of motor carrier and union organizations. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Civil Rights Key 9.10

Discriminatory effect of racially neutral "no-transfer" and "no-seniority-carryover" policies which precluded city truck drivers from transferring to more lucrative road-driving positions from which minorities had previously been excluded was not justified on ground of business necessity. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights Key 43

Mexican-American city drivers, who instituted employment discrimination action challenging policies which precluded transfer by city drivers to more lucrative road-driving positions and maintenance of separate seniority rosters for road and city drivers without provision for seniority carryover, did not have burden of showing that they had applied for road driving positions and that they were qualified for such positions where there was past history of discrimination, application would have been futile exercise and they had no opportunity to prove their qualifications. Civil Rights Act of 1964, § 701 et seq.; 42 U.S.C.A. § 2000e et seq.

Appeal from the United States District Court for the Western District of Texas.

Before Wisdom, Ainsworth and Godbold, Circuit Judges.

Wisdom, Circuit Judge:

This is an action brought under Title VII of the Civil Rights Act of 1964 by three Mexican-American city drivers employed by the defendant Yellow Freight System, Inc. The plaintiffs contend that the company defendant's past discrimination in the hiring of road drivers has been perpetuated by the company's no-transfer policy and by the maintenance of separate seniority rosters for road and city drivers without provision for seniority carryover by the defendant unions. As a result of these policies, the plaintiffs argue, they have been discriminatorily "locked in" their city driver jobs without any realistic opportunity to transfer to a higher paying road job position. The district court found no discrimination. On the authority of Rodriguez v. East Texas Motor Freight, 5 Cir. 1974,—F.2d—, decided today, we reverse.

In almost every respect this suit is a carbon copy of *Rodriguez*, except that *Rodriguez* was a class action while this is brought only on behalf of the individual plaintiffs. The plaintiffs here work as city drivers in Yellow Freight's San Antonio terminal. Like East Texas Motor Freight, Yellow Freight domiciles no road drivers in San Antonio. Like East Texas Motor Freight, Yellow Freight's history of road-driver hiring is heavily tainted by discriminatory exclusion of minority drivers.[1] And like East Texas Motor Freight, Yellow Freight, and the unions, have hindered the transfer of city drivers to road driver jobs by a no-transfer policy and the maintenance of separate seniority

---

[1] Yellow Freight responded to the plaintiffs' interrogatories by stating that it employed 50 line drivers at Dallas and 46 line drivers at Amarillo. Yellow Freight employed no Mexican-American line drivers at either terminal until after the complaint was filed in this suit.

rosters. This case was brought before the same district judge that heard *Rodriguez* a few days later. Similar to its finding in *Rodriguez*, the court found that none of the plaintiffs "could satisfy all the qualifications for a road driver position according to the company manual due to age or weight or driving record". The court concluded that "[t]he defendants did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise".

[1, 2] The defendants here advance many of the same arguments in support of the district court's conclusion that the defendants advanced in *Rodriguez*, and again we reject them. It is our considered view that the plaintiffs established a prima facie case of hiring discrimination perpetuated by the racially neutral no-transfer and no-seniority-carryover policies of Yellow Freight, Local 657, and the Southern Conference.[2] The discriminatory effect of these policies was not justified by a showing of business necessity. The district court's finding of no discrimination, therefore, is erroneous.

[3] Because this is not a class action, we pause to amplify our discussion in *Rodriguez* of McDonnell Douglas Corp. v. Green, 1973, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. In *McDonnell Douglas* the Court outlined the following test for a complainant in a Title VII action:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position re-

---

[2] Because the separate seniority lists originate at the Southern Conference level, we find no violation of Title VII by the defendant Teamsters International.

> mained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802, 93 S.Ct. at 1824. The defendants argue here that *McDonnell Douglas* must control. In *Rodriguez* we distinguished *McDonnell Douglas* on three grounds. Rodriguez was a class action; there was a history of hiring discrimination sufficient to make application for a road driving job a futile exercise; and the plaintiffs had been denied the opportunity to show that they were qualified to become road drivers, because they had not been given a road test. Although the instant case is not a class action, we are of the view that McDonnell Douglas is distinguishable on the other two grounds. Here there is a history of past hiring discrimination, and, as in *Rodriguez*, the plaintiffs had no opportunity to take a road test and thus to prove their qualifications.[3]

We reverse and remand to the district court for consideration of the remedy question in light of *Rodriguez*.

---

[3] Jim Norman, road operations manager for Yellow Freight at its Baxter Springs, Kansas, terminal, testified that he would consider a line driver qualified only after personally testing the driver in the equipment and checking his knowledge of safety requirements.

APPENDIX E

In the District Court of the United States
For the Western District of Texas
San Antonio Division

Patrick Resendis, et al.,

v.

Lee Way Motor Freight, Inc., et al.

Civil Action.
No. SA-71-CA-282.

Findings of Fact and Conclusions of Law

On the 24th day of January, 1973, came on to be heard the above entitled and numbered cause for trial on the merits, and both parties appeared in person and by their Attorneys of Record and announced ready for trial, whereupon the Court proceeded to hear the evidence from the witnesses and oral arguments of counsel and at the conclusion of the trial and after consideration of all the pleadings, the evidence adduced by both parties, the arguments of counsel and applicable law, the Court hereby makes its Findings of Fact and Conclusions of Law.

Findings of Fact

1. This Court has jurisdiction of this action by virtue of Title 42, U.S.C., Section 2000 e-5(f) and Title 28, U.S.C., Section 1343 (4) providing a cause of action under Title 42, U.S.C., Section 1981.

2. The plaintiffs are employees of the defendant truck line and members of the defendant Union and its affiliates (Local 657 of the Southern Conference of Teamsters and the International Conference of Teamsters), with the exception of Ar-

turo Rodriguez who is no longer an employee of the defendant truck line. Plaintiffs are all Mexican-American residents of the United States and residents of San Antonio, Bexar County, Texas, with the exception of Wilburn White who is a Black-American. The defendant truck line is a corporation doing business in the State of Texas and the City of San Antonio and operates and maintains a local city-wide freight terminal and a city-wide trucking service in San Antonio, Bexar County, Texas and is an employer within the meaning of Title 42, U.S.C., Section 2000 e-(b). The defendant Union and its affiliates are the representatives and bargaining agents of the plaintiff employees on an international, regional and local basis.

3. The plaintiffs were hired by the defendant truck line as follows:

Tony Escobedo became a regular city driver through the acquisition in 1966 of Texas-Arizona Motor Lines and has continued in that position to this date;

Patrick Resendis became a regular city driver in May, 1963, and has continued in that position to this date;

Arturo Rodriguez became a regular city driver in October, 1962, and transferred to an over-the-road driver job in May, 1967; in October, 1971 he was dismissed due to excessive accidents and is no longer an employee of the defendant truck line;

Wilburn White has been employed on a casual basis (i.e., whenever he was needed) as a city driver or dock worker since 1967 and continues in that status at this date; and Elias Gonzales began work as a city driver in 1950 and continues as such to this date.

4. It is stipulated that none of the plaintiff employees were discriminated against as to their original employment.

5. The defendant truck line had no road drivers domiciled in San Antonio, Bexar County, Texas prior to its acquisition of Texas-Arizona Motor Lines in 1966 and was operated solely as a local, city-wide pick-up and delivery service. Subsequent to the acquisition of Texas-Arizona Motor Lines, which had road drivers domiciled at San Antonio, the Company has operated a domicile for road drivers at San Antonio, Texas.

6. Of the twenty-six (26) road drivers currently listed for the San Antonio terminal, the Company has hired five, one of whom, the plaintiff Rodriguez, has been dismissed. Of the remaining twenty-two (22), all were employed by the acquired Texas-Arizona Motor Lines; the defendant Company had no part in the hiring of these employees.

7. Of the five road drivers referred to above, which the Company has hired, the plaintiff Rodriguez was among the first so hired.

8. On April 1, 1970 the defendant truck line and the defendant Union entered into the National Master Freight Agreement and Southern Conference Area Local Freight Forwarding Pick-up and Delivery Supplemental Agreement (hereinafter referred to as "Union Contract") which expires June 30, 1973 and the terms and conditions of which are fully known and understood by the plaintiff employees. The plaintiff employees have ratified this contract and prior similar contracts since the time of their employment, with the exception of Arturo Rodriguez who voted against ratification of the current contract solely because of the strike and lock-out by the Chicago bargaining unit in the Spring of 1970 and not due to any contract clause made the subject of this suit.

9. The provisions of the Union Contract providing for job transfer from a city driver to a road driver and vice versa, including the provision for separate seniority lists for city and

line drivers, apply to all job applicants and employees regardless of race or qualifications, and are not in any way discriminatory.

10. The defendant truck line's policy and regulations regarding job transfers are generally:

(a) The applicant must make written application for a new position at terminal location where the job is sought;

(b) The applicant must be willing to re-locate at the new terminal location;

(c) For a road driver job, applicants must pass certain standardized Department of Transportation tests and company tests (driving and physical); and

(d) The applicants must have certain road driving experience.

These regulations are not unreasonable and apply to all job applicants and employees regardless of race or qualifications. The fact that each terminal is autonomous as concerns the employment of drivers is proper and in accordance with accepted business practices.

11. The defendant truck line began posting bulletins as to the availability of jobs at other terminals, including road driver jobs, in 1971. The defendant truck line has attempted to recruit minority employees through local job fair programs and newspaper advertisements, including advertisements placed in minority publications, and at present has a policy requiring that before hiring a non-minority employee to fill an opening, the terminal manager must first contact the Company's personnel office and explain satisfactorily why he is not hiring a minority employee for the job.

12. The plaintiff, Patrick Resendis, has not signed up under any of the job opportunity bulletins relating to road driver job openings at other terminals. Neither has the plaintiff, Tony Escobedo, or the plaintiff, Elias Gonzales.

13. The plaintiff, Elias Gonzales, has never asked for a road driver job and states that he would not move from the San Antonio area to take one and refuses to give up any of his city driver seniority to take one.

14. The plaintiff, Arturo Rodriguez, was dismissed by the defendant truck line because of a poor driving record involving at least two accidents within the one year period immediately preceding his dismissal. Police accident reports indicated that he could have avoided at least one of the accidents. The defendant truck line's dismissal of the plaintiff, Arturo Rodriguez, was upheld through the Union grievance procedure and did not result from any discrimination against this plaintiff because of his race or national origin. The dismissal was for valid and proper business reasons.

15. The plaintiff, Tony Escobedo, is 5'9" tall and weighs almost 300 lbs. He has a very bad left leg, having been shot three times. The bad leg and his overweight condition are of continuing medical concern and cause plaintiff to be unusually slow in the performance of his current duties and prevent his physical qualification for the job of road driver. Any denial by the defendant truck line of a road driver job under these facts is for valid and proper business reasons and not in any way the result of discrimination against the plaintiff, Escobedo, because of his race or national origin.

16. The plaintiff, Wilburn White, has never made application for a road driver job. During the period that the plaintiff, White, worked as a casual employee for the defendant truck line, two other Black-Americans were also employed as casual employees. Two other Black-Americans were hired as regular city drivers in August and September of 1972. The defendant truck line has employed other Black-Americans as regular city drivers in the past. The failure to hire the plaintiff, White, has not been the result of any racial discrimination on the part of the de-

fendant truck line, and was so admitted during the plaintiff White's testimony in Open Court. The plaintiff, White, stated that discrimination, if any, against him was personally rather than racially oriented. The Court finds that there has been no unlawful discrimination against this plaintiff whatsoever.

17. The defendant truck line employs a substantial number of Mexican-American and Negroes in its San Antonio Terminal operations (both city and road) and there has been no showing of discrimination as regards the hiring practices of that office.

18. The plaintiff employees have never filed a discrimination grievance charging a violation under Article 38 of the Union Contract.

19. The plaintiff employees have never availed themselves of participating in the contract amendment negotiation meetings at the local Union level in an effort to change the job transfer requirements.

20. The plaintiff employees have not been discriminated against by their Union as the Union is comprised of a majority of Mexican-Americans and Negroes and every member is free to participate in the contract negotiating process and to vote on every issue or contract presented to the membership.

21. When the plaintiff employees inquired from various supervisory personel at the San Antonio Terminal as to the method of securing a road driving position, they were not discouraged nor mislead, but rather the requirements were explained (i.e. they would have to make application at the road driving terminal location, etc.) and the plaintiffs chose not to make application. The failure of the plaintiff employees to secure a road driving position was due to a lack of diligence on their part, an unwillingness to give up their city driving seniority, and an inability to meet the job qualifications rather than actual racial discrimination by either the defendant truck line or the defendant Union.

22. Both the defendant truck line and the Union defendants are bound by the contracts in that neither can unilaterally change the contract provisions by allowing a merger of seniority lists, a transfer of seniority or in any other manner attempting to alter, combine or discard the provisions of the separate contracts for city and road drivers without subjecting themselves to economic or other negative sanctions by the non-offending party.

23. Refusal by the defendant truck line to permit job transfers without loss of terminal seniority or to maintain separate seniority lists is a reasonable and proper business practice and in accordance with the Union Contract and in no manner causes, perpetuates or results in discriminatory practices by any of the defendants.

24. The fact that there are separate Union Contracts and job qualifications for city and road drivers is reasonable both as an accepted business practice and by the fact that the National Labor Relations Board recognizes the two job groups as separate bargaining units.

25. The defendant truck line did not prevent or discourage the plaintiff employees from seeking or securing a road job transfer nor from making written application for said position because of their race or because they filed a Complaint with the Equal Employment Opportunity Commission, or for any other reason.

26. The defendant truck line and Union did not discriminate against the plaintiff employees because they made a charge or indicated they would make a charge against the defendants to the Equal Employment Opportunity Commission.

27. The defendants did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise.

28. While not compelling, further evidence of the continuing desire of the vast majority of the local Union membership is contained in the Affidavit of R. C. Shafer, President and Business Manager of the local Union, and George Hardeman, Jr., Recording Secretary of the local Union, filed February 23, 1973, and stipulated to by the parties to this suit by Stipulation filed March 6, 1973. The Affidavits show that at the Union Membership meeting on February 11, 1973, after the trial of this case was completed, the employees of the defendant truck line, and others, rejected proposals that the next City and road driver contracts be merged and that both job classifications be permitted to transfer to the other with company seniority for all purposes. A further proposal to the effect that the seniority of the employees working for the freight lines remain as it is in the current contracts was approved by a vote in excess of two to one.

Conclusions of Law

1. I conclude as a matter of law that none of the defendants violated Title 42, United States Code, Section 2000e-5 or any section of Title 42 relating to race discrimination.

2. I further conclude as a matter of law that the plaintiffs, and each of them, take nothing by reason of their suit and that the defendants and each of them are entitled to judgment.

3. I further conclude that the defendants, and each of them, recover their court costs incurred herein against the plaintiffs.

Entered this 22nd day of March, 1973, at San Antonio, Texas.

/s/ JOHN H. WOOD, JR.
United States District Judge

APPENDIX F

Patrick Resendis, Tony Escobedo, Wilburn White, Arturo Rodriguez and Elias Gonzales, Plaintiffs-Appellants,

v.

Lee Way Motor Freight, Inc., et al., Defendants-Appellees.

No. 73-2322.

United States Court of Appeals, Fifth Circuit.

Nov. 25, 1974.

Mexican-American city truck drivers, former Mexican-American regular road driver and Negro casual city driver instituted employment discrimination action against motor carrier and union organizations. The United States District Court for the Western District of Texas, John H. Wood, Jr., J., rendered judgment in favor of the defendants and the plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that statistics established prima facie case of past discrimination in the hiring of road drivers; that discrimination had been continued by motor carrier's "no-tranfer" policy restricting transfers between city driver jobs and more lucrative road driver jobs and by maintenance of separate seniority rosters; that past hiring discrimination was perpetuated following abandonment of the "no-transfer" policy; that defendants failed to effectively answer prima facie case of employment discrimination against Mexican-American city drivers; that discharge of Mexican-American over the road driver was not result of discrimination; and that Negro casual city driver failed to prove that refusal to accord him regular status was result of racial discrimination.

Affirmed in part; reversed in part and remanded.

1. Civil Rights Key 44(1)

Statistics showing that, following motor carrier's acquisition of assets of another carrier which had an over-the-road terminal in city and which employed twenty-five or thirty white/Anglo road drivers, motor carrier hired approximately six white/Anglo road drivers and one Mexican-American road driver at the terminal and that carrier had never employed a Negro road driver in the city and disparity in percentage of minority employees between carrier's city and road driving forces established prima facie case of discrimination in past hiring of road drivers. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Civil Rights Key 9.10

Motor carrier's past discrimination in the hiring of road drivers was continued by carrier's "no-transfer" policy restricting transfer of city drivers to more lucrative road driver jobs and by maintenance by carrier and union organizations of separate seniority rosters. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights Key 9.10

Motor carrier's perpetuation of past hiring discrimination with respect to road drivers was continued following abandonment of its policy restricting transfer of city drivers to more lucrative road driver jobs by refusal of carrier and union organizations to permit minority city drivers to carry over their competitive status seniority to road driver jobs. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Civil Rights Key 44(1)

Motor carrier and union organizations failed to effectively answer prima facie case of employment discrimination in hiring for road driver jobs. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights Key 46

Motor carrier would be required to consider Mexican-American city drivers who had previously been discriminatorily excluded from more lucrative road driving positions for such positions as vacancies occurred and, if they should qualify for road driver positions, they should be awarded seniority carryover based on a "qualification-date" formula. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Civil Rights Key 9.12

Fact that motor carrier which had discriminatorily excluded minority persons from road driver positions did not acquire road terminal in city where Mexican-American city drivers who instituted employment discrimination action worked until 1966 was irrelevant to computation of seniority which those drivers would be entitled to carry over from their city driver positions to road driver jobs should they be found qualified for road driver positions. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. Civil Rights Key 46

If Mexican-American city truck drivers who had been discriminatorily excluded from more lucrative road driving positions should prove qualified to transfer to the road driver positions, they would be entitled to back pay. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Civil Rights Key 44(1)

Evidence that Mexican-American who had been discharged from his position as a road driver for motor carrier had been discharged because of poor driving record involving at least two accidents within one-year period immediately preceding his dismissal and that dismissal had been upheld through union grievance procedures sustained determination that dismissal was not result of discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Civil Rights Key 44(1)

Evidence that, at time Negro first began driving for motor carrier as a casual city driver, there were four Negro city drivers on regular status, that, since that time, motor carrier had hired four Mexican-American, one Anglo and two Negro regular city drivers and that Negro casual driver had suffered in the past from an "attitude problem" failed to prove that refusal to accord Negro casual driver regular status was result of discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, AINSWORTH and GODBOLD, Circuit Judges.

WISDOM, Circuit Judge:

Like its companies Title VII cases, Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, — F.2d —, and Herrera v. Yellow Freight System, Inc., 5 Cir. 1974, — F.2d —, this appeal in-

volves claims of discrimination in the exclusion of minority persons from the sought-after road driving jobs in the trucking industry. Plaintiffs Resendis, Escobedo, and Gonzales are Mexican-American city drivers for Lee Way Motor Freight, Inc. in San Antonio, Texas. Plaintiff Rodriguez was formerly a regular over-the-road driver in San Antonio for Lee Way, but was discharged after four and one-half years as a line driver. Plaintiff White is a Negro "casual" city driver for Lee Way in San Antonio.[1] The same district judge who decided *Rodriguez* and *Herrera* found that the plaintiffs had failed to prove a case of discrimination against any of the defendants under Title VII. We affirm in part and reverse in part and remand.

[1] Prior to January 1, 1966, Lee Way domiciled only city drivers in San Antonio. At that time, Lee Way acquired three-fourths of the assets of Texas-Arizona Motor Freight, Inc., which included an over-the-road terminal in San Antonio. Upon the acquisition, the 25 or 30 white/anglo road drivers domiciled there became the employees of Lee Way. Since then, Lee Way has hired approximately six white/anglo line drivers, and one Mexican-American line driver at the San Antonio terminal. The sole Mexican-American road driver is the plaintiff-appellant Antonio Rodriguez, who was discharged in 1972. Lee Way has never employed a Negro line driver in San Antonio. Of 44 city drivers for Lee Way in San Antonio, 26 or 28 are Mexican-American, four are black, and the remainder are white/anglo. Especially in light of the contrast in the percentage of minority employees between Lee Way's city and road driving fleets, we hold that these statistics establish a prima facie case of discrimination in the past hiring of road drivers.

[2, 3] This discrimination has been continued by Lee Way's no-transfer policy, and by the maintenance of separate senior-

---

[1] "Casual" drivers have no seniority. They are not required to work only for one company, but may take jobs as casuals with a number of trading companies in the area.

ity rosters through the action of Lee Way, Local 657, and the Southern Conference.[2] Lee Way abandoned its no-transfer policy in 1971, but the perpetuation of past hiring discrimination was continued through the refusal of the defendants to permit minority city drivers to carry over their competitive status seniority to road driver jobs.[3]

[4-7] The prima facie case of employment discrimination by Lee Way, the Southern Conference, and Local 657 against Resendis, Escobedo, and Gonzales has not been effectively answered.[4] We reverse the lower court's judgment with regard to these plaintiffs, and remand for consideration of the appropriate remedy in accordance with our opinion in *Rodriguez*. The district court should require that Lee Way consider these plaintiffs for road driver positions as vacancies occur, and the court should supervise closely the standards used by Lee Way in determining whether the drivers qualify for transfer. If any of the plaintiffs qualifies for a road driver position,[5] he should be awarded seniority carryover based on a "qualification-date" formula. See Bing v. Roadway Express, Inc., 5 Cir. 1973, 485 F.2d 441, 451. That Lee Way did not acquire a road driver

---

[2] We find no violation of Title VII by the defendant Teamsters International. See Herrera v. Yellow Freight System, Inc., 5 Cir. 1974, — F.2d —, n. 2.

[3] The operation of no-transfer policies and separate seniority rosters is fully described in Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, — F.2d —.

[4] William Blood, Director of Personnel for Lee Way testified that the company has undertaken recently an affirmative action program to increase its hiring of minority road drivers. While we find this program commendable, it does not excuse either Lee Way's past record or its present practices with regard to minority city drivers locked into their jobs by their inability to transfer seniority. See Rowe v. General Motors Corp., 5 Cir. 1972, 457 F.2d 348, 356.

[5] We note that John Reaves, terminal manager for Lee Way in San Antonio, testified that in his opinion Resendis is qualified as a road driver and that Gonzales "could probably qualify" as a road driver.

terminal in San Antonio until 1966 is irrelevant to the proper computation of seniority. No hardship will be inflicted upon Lee Way or the union defendants by adjusting the plaintiffs' seniority to dates prior to the time Lee Way domiciled road drivers in San Antonio. To the extent that returning these drivers to their "rightful place" works a hardship at all, it will work it on those white drivers for Lee Way who will find their seniority expectations altered. But, as the Court said in United States v. Bethlehem Steel Corp., 2 Cir. 1971, 446 F.2d 652, 663: "Assuming *arguendo* that the expectations of some employees will not be met, their hopes arise from an illegal system. Moreover, their seniority advantages are not indefeasibly vested rights but mere expectations derived from a bargaining agreement subject to modification." See also Vogler v. McCarthy, Inc., 5 Cir. 1971, 451 F.2d 1236, 1238-1239. If Resendis, Escobedo, or Gonzales proves qualified to transfer to the road, he should be awarded back pay. See Pettway v. American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d 211, 251-263; Johnson v. Goodyear Tire & Rubber Co., 5 Cir. 1974, 491 F.2d 1364, 1376-1380; Bing v. Roadway Express, Inc., 485 F.2d at 452-455.

[8] Arturo Rodriguez served as a line driver for Lee Way in San Antonio until he was fired on October 29, 1972. The district court found that Lee Way discharged Rodriguez "because of a poor driving record involving at least two accidents within the one year period immediately preceding his dismissal." Rodriguez's dismissal was upheld through union grievance procedures. He introduced no convincing evidence at trial that his dismissal was in any way improper. We conclude that the district court's finding of no discrimination in Rodriguez's dismissal is supported in the record.

[9] Nor can we disagree with the district court's finding that Wilburn White failed to prove a case of discrimination against him by any of the defendants. White began working as a city driver in a "casual" status in 1967. He complains that Lee Way

has refused to accord him "regular" status because he is a Negro. But in 1967, when White first began driving for Lee Way, there were four Negro city drivers on "regular" status. Since 1967 Lee Way has hired seven regular city drivers—four Mexican-American, one anglo, and two Negro. These statistics establish no prima facie case of discrimination against blacks by Lee Way in its hiring of city drivers in San Antonio.[6] Moreover, there was testimony at trial that White had suffered in the past from an "attitude problem." Although there was also testimony that White's attitude had improved, this factor alone provides an insufficient basis to doubt the correctness of the district court's finding that none of the defendants discriminated against White.[7]

Affirmed in part; reversed in part, and remanded.

---

[6] Compare Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, — F.2d — and the cases cited there, — F.2d at — and n. 17.

[7] Even White himself seems unsure that his inability to obtain a regular city driving job is the result of racial rather than personal, animus. The following colloquy took place at trial during White's cross-examination:

> Q. Now, have you ever told Mr. Shafer down at the Union that Lee Way has been discriminating against you personally?
>
> A. Yes, sir.
>
> Q. And did you tell him that the way you felt they were discriminating against and was because they weren't giving you as an individual a job?
>
> A. As an individual?
>
> Q. Yes, sir, give you, Wilburn White, a job.
>
> A. Yes, I told him that they could have given me more work. They could give me more work but they wasn't doing it.
>
> Q. You have never complained to Mr. Shafer of the Union about Lee Way discriminating against Negroes as a race, have you?
>
> A. No, sir.
>
> Q. Just against you personally?
>
> A. Yes, but I am a Negro.

APPENDIX G

United States Court of Appeals
For the Fifth Circuit

October Term, 1973

No. 73-2801

D. C. Docket No. CA-SA-71-CA-302

Jesse Rodriguez, Sadrach G. Perez and Modesto Herrera, on their own behalf and on behalf of those similarly situated,

Plaintiffs-Appellants,

versus

East Texas Motor Freight, Southern Conference of Teamsters and Teamsters Local 657,

Defendants-Appellees.

Appeal From the United States District Court for the Western District of Texas

Before WISDOM, AINSWORTH and GODBOLD, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the cost on appeal to be taxed by the Clerk of this Court.

November 25, 1974

Issued as Mandate:

APPENDIX H

United States Court of Appeals
For the Fifth Circuit

October Term, 1973

No. 73-2254

D. C. Docket No. CA SA-71-CA-296

Ernest Herrera, et al.,

Plaintiffs-Appellants,

versus

Yellow Freight System, Inc., et al.,

Defendants-Appellees.

Appeal From the United States District Court for the
Western District of Texas

Before WISDOM, AINSWORTH and GODBOLD, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

November 25, 1974

Issued as Mandate:

APPENDIX I

United States Court of Appeals
For the Fifth Circuit

October Term, 1973

No. 73-2322

D. C. Docket No. SA-71-CA-282

Patrick Resendis, Tony Escobedo, Wilburn White, Arturo Rodriguez and Elias Gonzales,

Plaintiffs-Appellants,

versus

Lee Way Motor Freight, Inc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas

Before Wisdom, Ainsworth and Godbold, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

November 25, 1974

Issued as Mandate:

APPENDIX J

United States Court of Appeals
Fifth Circuit

Edward W. Wadsworth, Clerk
Office of the Clerk
600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

August 18, 1975

To All Counsel of Record

No. 73-2801—Jesse Rodriguez, et al. v. East Texas Motor Freight, et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s)* for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

---

* Filed by Local Union 657, Southern Conference of Teamsters and East Texas Motor Freight.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours

EDWARD W. WADSWORTH, Clerk

/s/ CLARE F. SACHS
Deputy Clerk

cc: Mr. Jim Heidelberg

Ms. Debra Millenson

Mr. Theo. F. Weiss

Messrs. Richard C. Hotvedt
Harry A. Rissetto

Messrs. George E. Seay
William Strock

Messrs. Edward W. Penshorn
Bradford F. Miller

Messrs. G. Wm. Baab
L.N.D. Wells, Jr.
Hall Gillespie

APPENDIX K

United States Court of Appeals
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

August 18, 1975

To All Counsel of Record

No. 73-2322—Patrick Resendis, et al. v. Lee Way Motor Freight, Inc., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours

EDWARD W. WADSWORTH
Clerk

/s/ by CLARE F. SACHS
Deputy Clerk

cc: Messrs. Harry A. Nass, Jr.
Ruben Montemayor

Mr. Theo F. Weiss

Messrs. Paul Scott Kelly, Jr.
Raymond F. Beagle, Jr.

Messrs. Edward W. Penshorn
Bradford F. Miller

Messrs. G. William Baab
Hal K. Gillespie
L.N.D. Wells, Jr.

* Filed by Lee Way Fotor Freight, Inc., Local Union 657 and Southern Conference of Teamsters.

APPENDIX L

United States Court of Appeals
Fifth Circuit

Office of the Clerk
Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

August 18, 1975

To All Counsel of Record

No. 73-2254—Ernest Herrera, et al. v. Yellow Freight System, Inc., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s)* for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours

EDWARD W. WADSWORTH
Clerk
By CLARE F. SACHS
Deputy Clerk

cc: Messrs. Harry A. Nass, Jr.
Ruben Montemayor

Mr. Theo F. Weiss

Messrs. Paul Scott Kelly
Raymond F. Beagle, Jr.

Messrs. Edward W. Penshorn
Bradford F. Miller

Messrs. G. William Baab
Hal K. Gillespie

* Filed by Local Union 657, Yellow Freight System, Inc., and Southern Conference of Teamsters.

APPENDIX M

The Civil Rights Act of 1964,

As Amended—Title VII, Section 703(a) Through (j), 42 USC Section 2000(e)-2(a) Through (j)

§ 2000e-2. Unlawful Employment Practices—Employer Practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely, affect his status as an employee; because of such individual's race, color, religion, sex, or national origin.

* * * * * * *

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * * * * * *

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of

the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * * * * * *

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a),(b), Mar. 24, 1972, 86 Stat. 109.

APPENDIX N

Title 42, United States Code

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-651, 75-715, and 75-718
(Consolidated)

No. 75-651

TEAMSTERS LOCAL UNION 657, *Petitioner*
v.
JESSE RODRIGUEZ, ET AL., *Respondents*

No. 75-715

SOUTHERN CONFERENCE OF TEAMSTERS, *Petitioners*
v.
JESSE RODRIGUEZ, ET AL., *Respondents*

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC., *Petitioner*
v.
JESSE RODRIGUEZ, ET AL., *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER SOUTHERN CONFERENCE OF TEAMSTERS

DAVID PREVIANT
211 W. Wisconsin Avenue
Milwaukee, Wisconsin 53203

L. N. D. WELLS, JR.
G. WILLIAM BAAB
Suite 200—8204 Elmbrook Drive
Dallas, Texas 75247

Counsel for Petitioner,
Southern Conference of Teamsters

August, 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

SUBJECT INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-651, 75-715, and 75-718
(Consolidated)

No. 75-651
TEAMSTERS LOCAL UNION 657, *Petitioner*
v.
JESSE RODRIGUEZ, ET AL., *Respondents*

No. 75-715
SOUTHERN CONFERENCE OF TEAMSTERS, *Petitioners*
v.
JESSE RODRIGUEZ, ET AL., *Respondents*

No. 75-718
EAST TEXAS MOTOR FREIGHT SYSTEM, INC., *Petitioner*
v.
JESSE RODRIGUEZ, ET AL., *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER SOUTHERN CONFERENCE OF TEAMSTERS

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 505 F.2d 40 and reprinted here in the Appendix herein. (A. 68-111).[1]

The Decision of the United States District Court for the Western District of Texas, dated March 22nd, 1973, is reported at 6 CCH EPD ¶ 8815, and is similarly reprinted in the Appendix hereto. (A. 55-67).

[1] References to the Appendix printed pursuant to the requirements of Rule 36, following the grant of certiorari, are by the notation "A" followed by pagination.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit, reversing the District Court's Decision, was entered upon November 24, 1974. Petitions for Rehearing filed by employer East Texas Motor Freight (hereinafter ETMF), the Southern Conference of Teamsters (hereinafter Southern Conference) and Teamsters Local 657 (hereinafter Local 657) were denied upon August 18, 1975. Petitions for certiorari were thereafter timely filed by ETMF, Southern Conference and Local 657 within 90 days of that date. This Court has jurisdiction of the consolidated cases under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED [2]

1. Does a union violate Title VII [3] by negotiating a seniority system, non-discriminatory in origin and upon its face, with competitive job seniority from date

---

[2] Issues arising from a class-wide award of transfer and seniority relief, unrelated to a showing of discrimination against individual class members, are fully discussed in the brief filed by International Brotherhood of Teamsters in *T.I.M.E.-D.C., Inc.* v. *United States of America*, Consolidated Nos. 75-636 and 75-672. That brief contains a substantially more extensive discussion of the legislative history of Title VII (see fn. 3, *infra*) and this Court's decision in *Franks* v. *Bowman Transportation Co.*, — U.S. —, 47 L.Ed.2d 444 (1976). For brevity's sake, that discussion is not fully repeated herein.

Southern Conference defers to ETMF in regard to the serious issues raised by the Fifth Circuit's *sua sponte* certification of a Texas-wide class, and its holding that the mere existence of a statistical imbalance in racial composition of employees in a particular job classification justifies (a) disregard of the legal standard for proof of an individual claim of discrimination, and (b) disregard of evidentiary stipulations which effectively prohibit a finding of discrimination against the individual claimants.

[3] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

of entry into the particular bargaining unit, where alleged discriminatees have stipulated at trial that their claim is based solely upon the employer's refusal to consider their request to transfer into the particular bargaining unit, and the seniority system thus has no effect in excluding such employees from the bargaining unit jobs in question?

2. Does a union violate Title VII solely by the establishment and continuation of a seniority system, non-discriminatory in its origin and upon its face, solely because the seniority system provides competitive job seniority from date of entry into the particular bargaining unit?

STATUTORY PROVISIONS

Section 703(a) through (j) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a)-(j), 42 U.S.C. § 1981 and 29 U.S.C. §§ 158(b)(3) and 159(a) are reprinted in the Appendix. (A. 450-56).

STATEMENT OF THE CASE

A. Nature of the Case

The case at bar was brought as a private action under Section 706 of Title VII of the Civil Rights Act of 1964, as amended. In some respects, it raises questions substantially related to those before the Court in *International Brotherhood of Teamsters* v. *United States of America* (No. 75-636), and *T.I.M.E.-D.C., Inc.* v. *United States of America* (No. 75-672).

Here, plaintiffs were "city" motor freight employees for ETMF at its San Antonio, Texas terminal. They contended that they had been discriminatorily denied "road" motor freight jobs by ETMF and also variously complained of "no transfer" practices by ETMF and of the seniority system in effect at ETMF's

San Antonio terminal pursuant to collective bargaining agreements.

At trial, the parties entered into stipulations which defined plaintiffs' claims against ETMF, Southern Conference and Local 657, and substantially reflected upon evidentiary issues involved. Relevant stipulations were: (a) "that the only issue presently before the Court pertaining to the company (ETMF) is whether the failure of the defendant, East Texas Motor Freight, to consider plaintiffs' line (road) driver applications (pursuant to ETMF's non-transfer rule) constituted a violation of Title VII and 42 U.S.C. § 1981"; (b) that plaintiffs' claim against the union entities was based upon "the maintenance of separate seniority rosters for city drivers and line (road drivers . . . and "the fact that any city drivers regardless of their race, if they transfer from city driver classification to road driver classification loses his (sic) accumulated city seniority"; (c) that "the no-transfer rule of East Texas Motor Freight, that is, no-transfer between classifications which would include no-transfer for the city to road or road to city has been uniformly applied without regard to race, color or national origin"; and (d) "that the plaintiffs were employed at the San Antonio terminal of East Texas Motor Freight (in their original employment) without regard to their race, color or national origin."[4] As noted by the Fifth

[4] The precise stipulation was:

MR. WEISS: "The parties stipulate that the plaintiffs were employed at the San Antonio Terminal of East Texas Motor Freight without regard to race, color or national origin.

THE COURT: That means, Mr. Weiss, the original employment?

MR. WEISS: Yes, that's right, your Honor. Yes, sir, that's right, Your Honor."

Circuit, and as reflected by record evidence as well, the responsibility for hiring plaintiffs and initial assignment of job classifications rested solely with ETMF. Similarly, Southern Conference and Local 657 did not participate in the institution or application of ETMF's "no-transfer" policy prohibiting transfer between city and road classifications. Thus, plaintiffs' claims were restricted, as to Southern Conference and Local 657, solely to a theory of "lock-in" discrimination by the operation of the contractually-created seniority system governing job rights of road and city employees. (A. 114).

B. Statement of Facts

(1) The Nature of City and Road Jobs.

As noted above, plaintiffs were at all relevant times city motor freight employees at ETMF's San Antonio, Texas terminal.

City motor freight employees are those performing the various functions necessary to operate a local pick-up and delivery freight service (local drivers, hostlers [individuals moving equipment to various locations around the freight yard itself] dockmen, checkers, etc.). Road drivers are exclusively long-haul, over-the-road drivers.

At the time each plaintiff was originally hired, ETMF had no road operations in San Antonio, and employed no road drivers there. (A. 55). The only terminals within the State of Texas at which ETMF hires and domiciles road drivers are: Dallas, El Paso, Longview, Pecos, San Angelo, and Texarkana. (A. 70, fn. 3). Plaintiffs never applied there for road jobs. (A. 72-75). Prior to 1970, only Anglos (whites) held road jobs for ETMF in Texas. (A. 86).

Terms and conditions of employment, including wages, hours and seniority rights of ETMF employees are governed by various separate collective bargaining agreements which cover, respectively, the city employees on the one hand and road employees on the other at each separate ETMF terminal. (A. 115-16). Each separate city and road agreement at each separate terminal is signed by ETMF and the individual autonomous local union, affiliated with the International Brotherhood of Teamsters, with geographical jurisdiction over the area in which the particular ETMF terminal is located. (A. 116). Thus, at all relevant times there existed a separate collective bargaining agreement covering city employees at ETMF's San Antonio terminal, the contracting parties being Local 657 and ETMF. There has never been a road agreement between ETMF and Local 657 at San Antonio. The only road contracts within the State of Texas were and are in effect at the road terminals mentioned above, between ETMF and various local unions who were not made parties to this case.

These separate contracts, covering respectively road employees on the one hand and city on the other, at the various individual locations at which ETMF has terminals, have developed for wholly non-discriminatory reasons, discussed in more detail *infra*.

Under the contracts which define their terms and conditions of employment, city employees are all paid the same hourly wage, equal to and in some instances slightly higher than the hourly rates, where applicable, paid to road drivers. (A. 339, 349). For example, the effective hourly wage for ETMF's city employees at the San Antonio terminal as of January 1, 1973 was $5.80 (A. 349). Road drivers are paid a mileage rate

for most long haul driving, with the mileage rate formulated to approximate the road driving hourly rate applicable to non-driving work. (A. 340-41). As of January 1, 1973, the road hourly rate applicable to Texas was $5.72.[5] (A. 339) Fringe benefits for the two groups of employees (city and road) were and are identical. (A. 223). Regular city employees have a weekly guarantee of 40 hours of work, with time and one-half, and in some instances double time, for hours per week over that figure. (A. 223-24). Regular road employees have no weekly guarantee and do not receive premium pay for overtime work. (*Ibid.*). But despite the absence of a weekly hour guarantee, many road drivers nevertheless have an opportunity to earn a larger annual salary than that paid to city employees by working longer hours (up to 70 hours per week), being paid on a mileage basis for their driving. At the same time, road drivers bear their own living expenses incurred out of town, generally work longer hours and generally are away from their homes and families for many days at a time. (A. 223-24).

From the foregoing, it can be determined that regular city employees were guaranteed, as of January 1, 1973, a minimum gross yearly earning of more than $12,000.00, excluding all fringe benefits and premium pay considerations.[6] (A. 349). Because of the applicable pay rate, the guaranteed nature of the work, equal fringe benefits and the ability of city employees to work regular hours while remaining at their home

---

[5] The hourly rate for peddle-run (short haul) driving work was, as of January 1, 1973, $5.80. Peddle run work is considered road work and is governed by applicable road contracts. (A. 340).

[6] This minimum yearly earning has risen sharply since 1973 and is, as of July 1976, more than $16,000.

domicile and enjoying a normal family life, many employees apparently choose to do city work; thus, the Anglo, Black and Spanish-surname complements of city employees at ETMF's San Antonio terminal, indeed the make-up of city employees at terminals across the state of Texas, generally reflected the racial-national origin make-up of the respective communities in which the terminals were located. (A. 220-24; 352-416).

(2) *ETMF's No-Transfer Policy*

With limited exceptions discussed below, ETMF has at all times had a "no-transfer" policy prohibiting (1) transfer between city and road job classifications, and (2) transfer between terminals. Without regard to contract seniority rules, city employees who desired employment as road drivers, or vice versa, were required to forfeit their job seniority, resign and then apply for jobs in the other (city or road) job classification. (A. 72). Similarly, again without regard to contract seniority rules, employees who sought to transfer between terminals were, with one exception not applicable here,[7] required to forfeit all seniority before assuming a job at another terminal. Because there have never been road operations in San Antonio, city employees there have at all times been prohibited from transferring to road jobs by virtue of ETMF's policy prohibiting inter-terminal transfer. ETMF's lifting of the prohibition against inter-classification transfer for a thirty-day period in early 1972 was not

[7] Road drivers on lay-off are permitted to exercise their already-existing job seniority at other terminals within ETMF's Southern Conference Area.

effective as to San Antonio city employees. (A. 73). In short, contract rules governing job seniority *upon transfer* between the city and road classifications have never been operative at San Antonio, because such transfers have at all times been prohibited by ETMF.

(3) *Contract Seniority Rules*[8]

Historically, both because of patterns of organization of motor freight employees, and because of decisions rendered by the National Labor Relations Board,[9] there developed in the freight industry on a terminal by terminal basis separate collective bargaining units for city employees on the one hand and road employees on the other. (A. 143-48; 211-12). Race and/or national origin of the employees involved has had nothing to do with the development of separate road and city bargaining units. (A. 148, 212-13).

Separate units for city and road employees have continued to exist, on a terminal by terminal basis, as collective bargaining in the freight industry has progressed from single employers and local unions to state, regional, area and finally (in 1964) national bargaining. (A. 143-45). Since 1964, bargaining has been conducted by union and employer committees possessing powers of attorney from individual local unions and individual employers. (A. 205-10).

---

[8] The seniority rules here at issue are identical to those in *International Brotherhood of Teamsters* v. *United States of America* and *T.I.M.E.-D.C., Inc.* v. *United States of America,* (No. 75-636 and 75-672 (Consolidated)).

[9] See, *e.g., In Re Georgia Highway Express, Inc.,* 150 NLRB 1649 at 1651 (1965); *In Re English Freight Co.,* 58 NLRB 1387, 1389-90 (1944).

The result of such bargaining continues to be separate city and road contracts,[10] again on a terminal by terminal basis, between individual employers and individual local unions. As noted before, there has thus been at all relevant times a contract between ETMF and Local 657 governing city employees at ETMF's San Antonio terminal. Because no road employees are domiciled in San Antonio, there has been no road contract effective there.

Job seniority under applicable collective bargaining agreements, whether in the road job classification on the one hand, or the city job classification on the other, is "competitive" seniority within the definition previously adopted by this Court in *Franks* v. *Bowman Transportation Co.*[11] That is, road and city employees use their "job seniority" within their respective classification to compete in bidding for jobs and as protection against lay-off. (A. 72-73). Under existing collective bargaining agreements and the seniority provisions embodied there, an employee who is permitted by his employer to transfer between the road and city job classifications assumes job seniority in his new classification only from the date of employment therein. (A.73). Uncontradicted evidence at trial was that these seniority rules, embodying job seniority from the date of employment within the particular bargaining unit (road or city) "apply to all job applicants and employees (in the respective job classifications) regardless of race or qualifications." (A. 58). Thus,

---

[10] The contracts consist of a "national agreement" (the National Master Freight Agreement) and area and/or local supplements or riders governing the job rights of city, road, garage and office clerical employees (A. 98-99, 331-49).

[11] — U.S. —, 47 L.Ed.2d 444, 462-63, 471 (1976).

for example, *any* city employee, whether Anglo, Mexican-American or Black, upon moving to a road job, is required to give up his city job seniority and assume road job seniority only from the date of entry into the road bargaining unit and road job classification. (A. 58, 73). The same applies to road employees moving to the city.

Employees in both city and road job classifications have historically and continuously preferred this separation of road and city job seniority. (A. 221). Employees within the jurisdiction of Local 657 in San Antonio, overwhelmingly "minority" in terms of race and/or national origin make-up, and "city employee" in job classification, voted conclusively to maintain separation of road and city job seniority in a special election held shortly after trial of the instant case in 1973. (A. 49-54).

Seniority rules which define job seniority as the date upon which an employee began his employment in his job classification have never been used by Southern Conference or Local 657 to deny to individuals, discriminatorily refused employment in the road (or city), job seniority from the date they would have been employed in that classification "but for" unlawful discrimination. To the contrary, the union entities here involved consistently insisted on application of a "rightful place" seniority concept to those individuals who alleged and proved discriminatory denial of employment in, *inter alia,* the road motor freight employee classification.[12]

Applicable contracts have, at relevant times, expressly prohibited employment discrimination on the

---

[12] See *Bing* v. *Roadway Express Co., Inc.,* 485 F.2d 441 (5th Cir. 1973).

basis of race or national origin. (A. 217-19). Contracts applicable at all ETMF terminals in Texas (and elsewhere) have provided:

> The Employer and the Union agree not to discriminate against any individual with respect to his hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex, or national origin, nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of his race, color, religion, sex, or national origin.

None of the Plaintiffs here involved had ever sought to utilize contract grievance and arbitration procedures to prove discriminatory denial of road employment so as to warrant the grant to them of "rightful place" seniority within the road job classification. (A. 59).

C. The Trial Court's Decision

Dismissing plaintiffs' application for a class action, the trial court in the instant case held that the contract seniority system, embodying separate seniority for the city and road job classifications and bargaining units, did not violate Title VII or 42 U.S.C. § 1981. In so holding, the trial court found:

> (a) "It is stipulated that none of the plaintiff employees were discriminated against as to their original employment;"
>
> (b)"The named plaintiffs had not properly applied for road jobs and were in any event not qualified therefor;"
>
> (c) "The existence of separate contracts and separate job bidding and lay-off seniority for city and road drivers was reasonable 'as an accepted business practice and by the fact the National

Labor Relations Board recognizes the two job groups as separate bargaining units';"

(d) Contract provisions providing for separate job bidding and lay-off seniority for city and road drivers "applied to all job applicants and employees regardless of race or qualifications, and are not in any way discriminatory;"

(e) As a matter of law union defendants had not "violated Title 42, United States Code, Section 2000e-5 or any section of Title 42 relating to race discrimination." (App. pp. A-12, 73, 86).

D. The Court of Appeals' Opinion

Reversing the trial court, the United States Court of Appeals for the Fifth Circuit used the vehicle of "class action" to nullify the trial court's finding that individual plaintiffs had failed to prove their claims of discrimination.

Concluding summarily that *Rodriguez* was a proper class action under Rule 23 of the Federal Rules of Civil Procedure [13] and determining *sua sponte* that a "Texas-wide class of minority city drivers "was appropriate, the Court concluded that statistics reflecting the substantial disparity between Anglos on the one hand and Blacks and Mexican-Americans on the other in ETMF's Texas road driving force "established a prima facie case of past discrimination in hiring (in regard to road jobs)" which had affected plaintiffs. In so holding, the Fifth Circuit disregarded the trial court's undisputed findings that plaintiffs (a) had sought employment only in San Antonio, where no road jobs existed and had been awarded the highest

[13] We defer to ETMF's Brief as to presentation of argument concerning "class action" considerations.

paying jobs then available at ETMF's San Antonio terminal; (b) had not made proper application for road jobs, and (c) were in any event not qualified for road employment. Similarly, the Fifth Circuit disregarded plaintiffs' stipulation, in conformance with the afore-cited findings of the trial court, that they "were not discriminated against in original employment" when they were hired at San Antonio as city drivers and thus placed in the city driver job classification. Wrote the Fifth Circuit: "We accord no weight to the stipulation that the named plaintiffs were not discriminated against when they were hired at the San Antonio terminal (by ETMF) as city drivers," contending that the stipulation did not foreclose simultaneous discrimination against plaintiffs based upon "their inability to gain a road driver job." (A. 88).

Having thus concluded that plaintiffs (and apparently the Texas-wide class as well) had been discriminatorily denied road jobs in original hire, the Fifth Circuit disregarded the obvious fact that ETMF's "no-transfer" policy had rendered contract seniority rules governing transfer inoperative at the San Antonio terminal. Instead, the appellate court concluded that contract seniority rules providing separate job seniority for city drivers on the one hand and road drivers on the other, effectively discouraged the transfer of city drivers to road positions and thus discriminatorily "locked-in" minority city drivers to their lower paying jobs. (A. 99-100). Because representative union committees, acting upon powers of attorney from local unions, had participated in negotiations resulting in contract seniority rules which did not provide for "job seniority carryover . . . on a one-time

only basis for qualified minority city drivers who wished to transfer to the road," Southern Conference and Local 657 were held to have violated and thus to be liable under Title VII and 42 U.S.C. § 1981. (A. 98-101).

As part of its general guidelines governing "remedy," the Fifth Circuit ordered that "qualified minority" city drivers in the Texas-wide class be permitted to transfer within a "Texas-Southern Conference" area.[14] Road seniority for *all* such employees was to be fixed according to a "*Bing* qualification date" formula,[15] apparently *regardless* of any showing (or lack thereof) of discrimination against the individual. (A. 105-07).

SUMMARY OF ARGUMENT

I. Contract seniority rules here at issue, effective only upon transfer between city and road jobs, do not discriminatorily "lock in" San Antonio city employees to their city jobs, in violation of Title VII. Because ETMF enforced non-contractual "no-transfer" rules which at all times *prohibited* San Antonio city employees from transferring to road jobs and road bargaining units at other terminals, contract seniority

---

[14] The "Southern Conference" encompasses a ten state area from Florida to Texas, a substantially larger area than Texas alone. The court did not make clear whether or, if so, why Texas city employees would or should be able to claim road vacancies in the larger area.

[15] *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973). There, "futility" was determined to have excused individual minority employees from actually applying for road jobs. The individual's "qualification date" (the date he was qualified to be a road driver) and the actual filling of road vacancies at his terminal (there Atlanta) of domicile were used to determine "rightful place" seniority.

rules effective *only upon transfer* were *never operative*. In *Franks* v. *Bowman Transportation Co.*, — U.S. —, 47 L.Ed. 2d 444 (1976) this Court inferentially recognized that an employer's exclusion of employees from a bargaining unit does not affect the legality of facially neutral contract seniority rules governing the rights of bargaining unit employees. Similarly, appellate courts have recognized that unions are not necessary parties where an identical "no-transfer" rule is at issue (*Jones* v. *Lee Way Motor Freight*, 431 F.2d 245 [10th Cir. 1971]) and have exonerated union defendants from liability where ETMF's "no-transfer" rule was the basis of complaint. *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974). Contract seniority rules which never applied to San Antonio city employees cannot discriminate against them, and do not violate Title VII.

II. Even where transfer between city and road bargaining units is permitted, contract seniority rules, neutral in their origin and upon their face, do not unlawfully discriminate. City jobs are not menial, low paying jobs, but rather are desirable jobs which many employees, regardless of race or national origin, prefer over road jobs. Unlike otherwise qualified minority employees who occupy the lowest paying jobs in a plant, line-of-progression seniority system, minority city employees have not uniformly been denied road jobs for discriminatory reasons. In fact, an overwhelming majority of freight industry employees, including minority city employees, desire the continuation of contract seniority rules which provide for job seniority only from the date of employment in the respective city or road bargaining unit. Under these circumstances, the seniority rules at issue constitute a "bona fide senior-

ity . . . system" within the meaning of Section 703(h) of Title VII.

Union compliance with the Fifth Circuit's directive to permit "all minority city employees to transfer to the road with carryover (competitive) seniority . . ." would result in reverse discrimination which this Court says Title VII prohibits. *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). Union contract rules and practice permit city employees who are discriminatorily denied road jobs to obtain "rightful place" road job seniority under contract grievance and arbitration procedures, which San Antonio city employees never sought to utilize. Contract rules thus strike a reasonable balance between a union's twin responsibilities of (a) protecting against discrimination in the filling of road jobs and (b) protecting against reverse discrimination which would result from the indiscriminate award of competitive road job seniority to minority employees, solely on the basis of their race or national origin. *Franks* v. *Bowman Transportation Co.*, 47 L.Ed. 2d 444 (1976). A finding that contract seniority rules violate Title VII is not justified.

ARGUMENT

I.

The Contract Seniority Rules Here at Issue, Effective Only on Transfer Between Road and City Classifications, Have Never Been Operative at ETMF's San Antonio Terminal. Therefore, They Have Not "Locked-In" San Antonio Employees to Their City Jobs.

In finding that Southern Conference and Local 657 violated Title VII [16] "for their role in establishing separate seniority rosters that failed to make allowance for minority city drivers who had been discriminatorily relegated to city driver jobs . . . ." the Fifth Circuit Court of Appeals relied upon its conclusion that "the inability of city drivers to carryover their competitive-status seniority formed an important link in the chain that "locked" minority drivers into city driver jobs." (A. 99-101). As noted before, contract seniority rules governing "competitive-status" road seniority were inoperative as to San Antonio city employees, and formed no part of the chain that "locked" San Antonio minority drivers into city driver jobs.

In support of the foregoing conclusion, the Fifth Circuit itself noted that "the company (ETMF) has always exercised full responsibility for hiring; the unions have never exercised any." (A. 99; See 87, fn. 18). Southern Conference and Local 657 were not responsible for any alleged discrimination in regard to plaintiffs' hire. Moreover, the parties stipulated at

---

[16] The Fifth Circuit simultaneously found a violation of 42 U.S.C. § 1981. For purposes of argument, we assume that all considerations relevant to a finding of Title VII violation apply identically to § 1981, and make no further mention of the latter provision.

trial: (a) that plaintiffs were employed by ETMF at its San Antonio terminal without regard to their race, color or national origin and (b) that plaintiffs' claim against ETMF was based upon the company's failure to consider their road driver applications pursuant to ETMF's no-transfer rule. In another context,[17] the Fifth Circuit itself noted that "the gist of the complaint in cases like the one before us . . . is the policies of the company which discouraged and prevent transfer regardless of qualifications. . . ." (A. 95). The company "transfer" policies referred to were those which (a) prohibited transfer between city and road job classifications and (b) prohibited transfer between terminals. Nowhere does the Fifth Circuit (or trial court) find, suggest or even intimate that Southern Conference and Local 657 were in any respect responsible for ETMF's "no transfer" policies.

The significance of the foregoing is that plaintiffs and all other minority (and majority) San Antonio city employees were absolutely prohibited from transfer to road jobs by virtue of (a) their initial hire as city employees at the San Antonio terminal where there were no road jobs and (b) ETMF's no-transfer policies which, except for a 30 day period in 1972, prohibited transfer between city and road classifications and *at all times* prohibited their transfer to other terminals at which ETMF's only road jobs were domiciled. As to San Antonio minority (and majority) city employees, contract seniority rules operative upon transfer from city jobs to road jobs *were never operative,* because such transfers were always prohibited.

---

[17] The referenced "context" was the appellate court's discussion of the trial court's finding that named plaintiffs were not qualified for road jobs.

Contract seniority rules were *not* a causal "link in the chain" that allegedly locked San Antonio minority drivers into city driver jobs.

Can racially neutral contract seniority rules, never operative and thus *not* part of a causal chain of alleged discrimination, be a basis for finding Title VII violation and liability? Wrote this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 at 430-31:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has prescribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment *when the barriers operate* invidiously to discriminate upon the basis of racial or other impermissible classification. (Emphasis added).

Seniority rules which *do not operate* do not fit the *Griggs* equasion nor fall within Title VII's prohibition.

Conceptually, ETMF's San Antonio city drivers are in the position of the rejected applicants whose claim for relief was before this Court in *Franks* v. *Bowman Transportation Co.*, — U.S. —, 47 L.Ed.2d 444 (1976).[18]

In *Franks*, this Court recognized that an employer's exclusion of applicants from Bowman's over-the-road seniority system there in effect did not affect the *bona*

---

[18] The Fifth Circuit's decision in *Franks*, reported at 495 F.2d 398 (5th Cir. 1974) is discussed *infra*, both as to the effect of a "no-transfer" rule and as to the seniority system involved there.

fides of the system: "The underlying legal wrong affecting them (the applicants) is *not* the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system." — U.S. at —, 47 L.Ed.2d at 458. Here, the "underlying legal wrong" (if there is one) affecting San Antonio's city employees is (a) their original hire as city employees and (b) ETMF's absolute prohibition against subsequent transfer to the road.[19] *Franks'* acknowledgment that the *bona fides* of a neutral seniority system are unaffected by employer's discriminatory exclusion of individuals from the bargaining unit within which the system operates reduces, at bottom, to an acknowledgment that a facially neutral seniority system does not violate Title VII when not causally linked to discrimination. So it is here.

That logic has not escaped other appellate courts. In *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d at 245 (10th Cir. 1970), cert. den. 401 U.S. 954 (1971). A no-transfer policy almost identical to that of ETMF here was determined to violate Title VII by perpetuating discriminatory hiring practices.[20] There were in effect between the employer and local unions contractual job seniority rules identical to those here in effect between ETMF and Local 657. Nevertheless, neither the trial court or Tenth Circuit found that contract seniority rules violated Title VII. Indeed, unions were

---

[19] Nothing herein is intended to indicate that plaintiffs were discriminated against in their original hire as city drivers in San Antonio, or to approve the Fifth Circuit's wholesale disregard of their stipulation to the contrary. See fn. 2, *supra*.

[20] Again, we note that plaintiffs stipulated at trial that they were not discriminated against in their original hire. See A. 113; fns. 2 and 19, *supra*.

never made a party to the action. It was Leeway's "no-transfer" rule that discriminated against minority plaintiffs. Where such a no-transfer policy operated, the legality of seniority rules could not be considered.

Similarly, in *Thornton* v. *East Texas Motor Freight,* 497 F.2d 416 (6th Cir. 1974), the Sixth Circuit reversed the trial court's finding of local union liability based upon the existence of ETMF's "no-transfer" rule. *Id.* at 425-27. Again, consideration as to violation of Title VII on the part of union entities was directed *solely* towards the existence of the no-transfer rule. Contract seniority rules, identical to those involved here, were never considered. *Id.* at 425-26. Where union liability was at issue, contract seniority rules obviously would have been considered had they been deemed to constitute a "causal link" in alleged discrimination against the plaintiffs in *Thornton.* The Sixth Circuit's finding of no union liability reduces to an acknowledgment that contract seniority rules do not constitute a "causal link" in perpetuating hiring discrimination where there exists an absolute no-transfer prohibition.

The factual background in *Franks* v. *Bowman Transportation Co., supra,* was different. There, employer Bowman in 1967 discontinued its rule flatly prohibiting inter-departmental transfers. Applicable collective bargaining agreements continued thereafter to recognize "departmental seniority." Specifically noting that the no-transfer rule had been eliminated, the Fifth Circuit proceeded to consider the post-1967 legality and effect of the seniority rules. 495 F.2d at 410-11, 414-16. Elimination of the no-transfer policy had given rise to the possibility of transfer between departments. The Fifth Circuit, like this Court in

Franks, the Tenth Circuit in *Jones,* and the Sixth Circuit in *Thornton,* recognized that so long as the no-transfer prohibition existed, contract seniority rules had no causal effect. *Ibid.*

Logic and the legal authority cited above compel the conclusion that contract seniority rules, effective only upon transfer, did not operate to perpetuate alleged hiring discrimination at ETMF's San Antonio terminal. Plaintiffs, city employees there, were not discriminatorily "locked-in" to their city jobs by contract seniority rules, and the Fifth Circuit's holding to the contrary is erroneous.

II.

Neutral Contract Seniority Rules, Providng for Job Seniority From Date of Entry Into the Respective (City or Road) Bargaining Unit, Are Preferred by a Substantial Majority of Affected Employees, Including Minority City Employees. Southern Conference and Local 657 Have Made Reasonable Accommodation to the Rights of Those Discriminatorily Excluded From Subject Bargaining Units. The Existence of Such Contract Seniority Rules Therefore Cannot Be the Basis for a Finding of Union Title VII Violation and Liability on the Part of Southern Conference and Local 657.

The road traveled by the Fifth Circuit on its way to determining that contract seniority rules violate Title VII was not an easy one. That Court itself admits that "a pattern of past discriminatory hiring is essential to the plaintiffs' case (citing cases.)" (A. 85). And it has been conclusively shown that the existence of an absolute no-transfer policy negates the effect of seniority rules which operate only upon transfer. (pp. 18-23, *supra*). Because plaintiffs stipulated at trial that they had not been discriminated against in their original hire, and because, moreover, ETMF

at all times had a policy prohibiting transfer by San Antonio city employees to the road, consideration of contract seniority rules should have been foreclosed.

These barriers, the Fifth Circuit chose not to confront. Rather, that court *sua sponte* certified the existence of a Texas-wide class of minority city drivers, domiciled at all ETMF's Texas terminals, and then proceeded to litigate a claim of discriminatory denial of road employment which San Antonio city drivers could not, on the record evidence adduced at trial, present.

The Fifth Circuits spawning of a class Texas-wide in scope was inconsistent with terminal-wide classes found appropriate in other cases. See *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975), cert. pending, (No. 75-788); *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973). Similarly, equitable considerations justifying such a class (upon the basis that the right of minority employees at Texas terminals other than San Antonio might otherwise not be protected) were wholly absent: there simultaneously pended in the Northern District of Texas a pattern and practice suit against East Texas Motor Freight brought by the Justice Department. (A. 108-11)

While the Fifth Circuit's *sua sponte* class certification of a Texas-wide class is the sole vehicle by which contractual seniority rules come into issue,[21] Southern Conference and Local 657 now willingly address the question. As to the union entities who are parties

---

[21] Again, we leave to ETMF detailed discussion of the propriety of the Fifth Circuit's decision in regard to class action aspects of the case.

here, no Title VII violation has occurred and no finding of Title VII liability is warranted.

In determining that contract seniority rules violated Title VII, and rendered Southern Conference and Local 657 liable therefore, the Fifth Circuit simply noted that the rules provide for job seniority from date of entry into the particular (road or city) bargaining unit "without provision for seniority carry-over by minority city drivers" (A. 99) and that because unions could have allowed "one-time-only seniority carryover . . . for qualified minority city drivers who wished to transfer" contract seniority rules were without "business necessity" justification. The Fifth Circuit's holding in this regard: (1) ignores Title VII's recognition that there exist "bona fide" seniority systems; and (2) results from an unreasoning application of principles developed in wholly distinguishable cases decided in the context of plant, line of progression seniority systems, simultaneously disregarding the factual context in which the contract seniority rules here at issue operate.

Title VII provides at Section 703(h)[22] that:

> "Notwithstanding any other provision of this sub-chapter, it shall not be an unlawful employment practice for an employer here to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. . . ."

Indeed, in rendering a decision concerning the right of rejected applicants to seniority relief, this Court

---

[22] 42 U.S.C. § 2000e-2(h).

accepted as a logical underpinning thereof the fact that "a discriminatory refusal to hire does not affect the bona fides of (a) seniority system." *Franks* v. *Bowman Transportation Co., supra* at 457.[23] Thus implicit in *Franks* is the assumption that there *is* such a thing as a bona fide seniority system.

Locically, *no* seniority system can award seniority to those individuals whom the employer has excluded therefrom. This is true whether the excluded individuals are rejected applicants as in *Franks*, or, as in the instant case, individuals shunted by the employer into another bargaining unit and job classification. And where the existence of different bargaining units and job classifications has absolutely no base in racial or ethnic discrimination, but rather in legitimate, historical non-discriminatory reasons, an award of job seniority from date of entry into the respective bargaining unit is literally "not the result of an intention to discriminate because of race, color, religion, sex or

---

[23] The entire quotation was:

> "The Court of Appeals reasoned that a discriminatory refusal to hire 'does not affect the bona fides of the seniority system. Thus the differences in the benefits from conditions of employment which seniority system accords to old or new employees is protected as "not an unlawful employment practice" by [§ 703(h)]. 495 F.2d at 417. Significantly, neither Bowman nor the unions undertake to defend the Court of Appeals' judgment on that ground. It is clearly erroneous."

Obviously, what was "clearly erroneous" was the Court of Appeals' denial of seniority relief to rejected applicants upon the basis of the quote. Because the remainder of this Court's majority opinion assumed a "bona fide" seniority system in determining the seniority relief to be awarded rejected applicants, the Court of Appeals' reasoning that discrimination in hire "does not affect the bona fides of (a) seniority system" must be given substantial credence.

national origin. . ." The Fifth Circuit makes no attempt to question the legitimacy of the reasons underlying the existence of separate collective bargaining units for city and road employees. Similarly, there is no evidence nor, in the Court's written opinion, the slightest intimation that the existing job seniority rules evidence an intention to discriminate. In sum, the Fifth Circuit at a stroke (1) denies the contract seniority rules here at issue "bona fide" status based solely upon ETMF's alleged discrimination in hire and (2) presumes the seniority rules are intended to discriminate, without supporting record evidence.

This the Fifth Circuit did by a rote, unreasoning application of case law inapposite to the factual circumstances of the instant case. The legal principle it applied was: Where an employer discriminates on the basis of race or national origin in the assignment of jobs, a seniority system which defines job seniority based upon the date of entry into a particular job unlawfully perpetuates the employer's hiring discrimination. *See, e.g., United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), cert. denied 406 U.S. 906 (1972); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969); *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968).[24] Each of these cases originated and was decided in the context of a plant, line-of-progression seniority system. Thus, there runs through the cases a common factual thread:

> (1) A job seniority system necessarily tied to and originating in the employer's racial and ethnic discrimination in assignment of jobs;

---

[24] See also *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), cert. den. 404 U.S. 1006 (1972).

(2) A sometimes-existing pattern of racially-segregated unions;

(3) A line-of-progression job seniority system where minorities are shunted into the most menial low-paying jobs, which no individual would choose to fill if qualified for other employment; and

(4) Utilization of the job seniority system by union entities there involved to oppose and obstruct the grant of "rightful place" job seniority.

In *all* of the cited cases the job seniority system involved was applicable to a local plant unit, and no attempt was made by either the employer or unions to justify the seniority system on a non-racial or national origin basis. To the contrary, the finding of an *intent* to maintain discriminatory hiring conditions was warranted, and in *Quarles* was specifically made. *Quarles, supra,* at 517-18. Racially segregated local unions formed part of the factual background in *Papermakers, Jacksonville Terminal* and *Robinson.* In *each* of the cited cases racial and ethnic minorities were restricted at hire to low-paying, menial jobs which no employee would voluntarily choose to fill if given a choice. Finally, there is no indication in any of the cases that unions involved agreed to "rightful place" seniority relief for hiring discriminatees. Indeed, in *Johnson* v. *Goodyear Tire & Rubber Co.,* the unions involved actually sought an injunction against the grant of seniority relief by the employer. *Johnson, supra,* fn. 24, at 1369.

From the foregoing cases developed a legal presumption that where an employer discriminates at original hire in the assignment of jobs, a job seniority system awarding seniority upon the basis of entry into the particular job unlawfully perpetuates hiring dis-

crimination and violates Title VII. When applied to the instant case, the presumption breaks down and cannot be entertained.

Contract seniority rules in the instant case are neutral on their face. They apply to all employees within the bargaining unit (city or road) and job classification regardless of race or national origin. Similar to the seniority rules and the cases cited above, those applicable here award job seniority from date of employment in the respective (city or road) bargaining unit and job classification. There the similarities end. Record evidence regarding the seniority rules here at issue establishes the following:

> (1) Rules establishing separate job seniority for city and road bargaining units and job classifications have no origin in nor do they represent an intention to discriminate on the basis of race or national origin; in fact, they are preferred by substantial majority of employees, including but not limited to minority city employees;
>
> (2) Unions have never been segregated upon racial or ethnic lines; for example, the local union involved here, Local 657 is integrated and indeed controlled by what are otherwise regarded as racial or ethnic minorities;
>
> (3) There is no line of progression between city and road jobs, and city jobs are not menial, low-paying jobs which no individual would choose to fill if qualified for other employment; rather, city jobs pay well, have weekly guarantees, have fringe benefits equal to road jobs, and are for various reasons preferred by many employees regardless of race or national origin; and
>
> (4) Job seniority rules have never been used by union entities to oppose and obstruct the grant of

> "rightful place" job seniority to those discriminatorily excluded from seniority units in job classifications by the employer, rather, contract rules prohibit racial or ethnic discrimination and provide a means for employees to obtain "rightful place" seniority upon a showing of such discrimination.

These evidentiary considerations should be compared with those listed at pp. 27-28, *supra*.

Nor do the recited factual considerations constitute a distinction without a difference. Rather, taken with applicable legal authority, they compel a finding that the contract seniority rules do not violate Title VII, and that Southern Conference and Local 657 cannot be held under Title VII therefor:

First, it simply cannot be presumed by Southern Conference, or Local 657, or any court making a realistic analysis, that *all* otherwise qualified minority employees in the city classification have been discriminatorily denied road employment. This is obviously the case, for clear and compelling reasons. As noted above, city jobs are good jobs and are populated not solely or even primarily by minority race or ethnic employees. Road jobs were not available at all of ETMF's terminals. They were not available at San Antonio, and in this connection plaintiffs thus stipulated at trial that they were not discriminated against when they were employed as city drivers at San Antonio. Indeed, the Fifth Circuit recognized:

> "ETMF's system of terminal-based responsibility for hiring and of domiciling road drivers only at certain road terminals is not discriminatory, and we leave those practices in tact." (A. 103).

ETMF's terminals are separated by substantial distances. Analogizing to a plant employment situation, one imagines an individual applying in Cleveland and being hired at a high paying welder's job, thereafter learning that the same employer has an operation in Chicago where tool and die workers, in an entirely different job classification and seniority system, are paid even more, and thereafter demanding job seniority rights in Chicago upon the allegation that he was discriminatorily denied employment there, when in fact he never sought it. There may well be individuals who were discriminatorily denied employment as tool and die workers in Chicago. The individual who sought and obtained a high paying job in Cleveland was not one of them.

Similarly, there may have been minority individuals discriminatorily denied employment as road drivers by ETMF. That is not to say nor can it be said that *all* minority race and national origin city employees were thus discriminated against. On precisely this logic, plaintiffs who were city drivers at San Antonio stipulated that they were not discriminated against in their original hire. The Fifth Circuit found a Title VII violation and held Southern Conference and Local 657 liable therefor because they had not permitted all minority employees to transfer to the road with carryover seniority. The presumption implicit in that holding is that *all* minority city drivers had been discriminatorily denied road employment. Plainly, that presumption cannot withstand analysis and is contrary to record evidence. The Fifth Circuit's error in that regard infects its finding that Southern Conference and Local 657 violated Title VII.

Insofar as they act in a representative capacity[25] labor organizations have the obligation to represent bargaining unit employees without regard to race (or national origin). See *Steele* v. *Louisville & N. Ry.*, 323 U.S. 192 (1944); and see *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953) As far as is consistent with the foregoing restrictions, unions are similarly duty bound to attempt to obtain, through a collective bargaining agreement, contractual terms and conditions of employment which the employees they represent desire. See *Hughes Tool Co.*, 104 NLRB 318 (1953). See also *Emporiam Capwell Co.* v. *Community Organization*, 420 U.S. 50 (1975). Labor organizations cannot, of course, permit the will of a majority of bargaining unit employees to work racial or ethnic discrimination upon a minority. See *Franks, supra*, at 468-70. By the same token, neither is a labor organization justified in effecting reverse discrimination. As recently as June 25, 1976, this Court was constrained to make it entirely clear that Title VII and Section 1981 protect *all* individuals, including whites, from employment discrimination based upon race or national origin. *McDonald* v. *Santa Fe Trail Transportation Company*, — U.S. —, 44 U.S.L.W. 5069 (June 25, 1976).

Record evidence establishes beyond argument that the seniority system here at issue is one which road

---

[25] There is no record evidence that Southern Conference has at any time been collective bargaining representative of the employees whose rights are at issue here. Rather, the Southern Conference was held liable in the instant case solely because various of its officers and/or representatives and employees had served upon negotiating committees, acting upon powers of attorney from local unions, who participated in negotiations resulting in the contract rules at issue. (A. 98-99).

and city employees, including, but not limited to, minority city employees, prefer. The system did not originate in racial or ethnic discrimination. Its present intention is not to continue such discrimination. Nor, as we have said before, has the system been used to perpetuate hiring discrimination.

Contract rules *prohibit* discrimination based upon race or national origin. There exists a contract grievance and arbitration procedure whereby individuals who have been discriminated against can vindicate their rights, including but not limited to obtaining an award of "rightful place" seniority—the seniority in road or city jobs they would have had "but for" discrimination against them.[26] There is no evidence in the record here, nor did either the trial or appellate courts find, that plaintiffs or any other of ETMF's minority employees had been in any respect frustrated in their attempt to gain "rightful place" seniority through the grievance and arbitration procedure. Again, as noted above, Teamster entities have agreed to and advocate a "rightful place" discrimination remedy.

At bottom, the Fifth Circuit convicts Southern Conference and Local 657 because contract seniority rules do not *automatically* grant to all minority city drivers, as alleged discriminatees, competitive-status job seniority in road bargaining units. *No* contract seniority rules can automatically remedy discrimination. Discriminatees must be identified and appropriate remedies fashioned thereafter. When plaintiffs

---

[26] We do not suggest that utilization of contract grievance and arbitration procedures would preclude litigation of a subsequent Title VII claim. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

themselves chose not to use contract procedures to obtain their remedy, Southern Conference and Local 657 can scarcely be criticized for not doing so unilaterally. Especially is this so where ETMF has consistently argued that there has not been discrimination in road employment, and where plaintiffs themselves stipulated at trial that they had not been discriminated against.[27]

Equally compelling are considerations relating to the rights of incumbent road drivers. This Court, in *Franks* v. *Boman Transportation Co., supra,* determined that applicants rejected for road employment upon a racial or ethnic discriminatory basis are entitled to "rightful place" seniority in the filling of subsequent road vacancies. But in so doing, the Court majority recognized, and the dissent strongly stated, that *incumbent road drivers do have some rights. Franks, supra* at 468, 471, 473-78. These rights, union entities are obligated to protect by virtue of their representative status. See *Equal Employment Opportunity Commission* v. *MacMillan Bloedell Containers, Inc., supra,* fn. 27.

Plainly, in regard to the exercise of competitive-status job seniority, incumbent road drivers should

---

[27] In *Equal Employment Opportunity Commission* v. *MacMillan Bloedell Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974), in a similar context, the Sixth Circuit wrote concerning joinder of union entities as Rule 19(a) defendants:

> This provides the union with a full opportunity to participate in the litigation in the formulation of proposed (seniority) relief against MacMillan. *As a practical matter, the Union need not play a role in the litigation until the court finds that MacMillan has violated Title VII.* Such an opportunity will allow the Union to protect adequatedy the interests of its members, will provide the discriminatee with full and complete (seniority) relief and will also insure that the suit is handled at one time and in one forum. (Emphasis added).

not be subjected to competition from individuals who have *not* been discriminatorily denied road jobs, but who, rather, assumed their city jobs voluntarily To award minority city employees competitive status seniority in the road bargaining unit upon transfer, *solely on the basis of their race or national origin,* is to subject incumbent road drivers, white, black or brown, to precisely the reverse discrimination which this Court says Title VII prohibits. *McDonald* v. *Santa Fe Transportation Company, supra; Griggs* v. *Duke Power Co., supra,* at 430-31.

Yet, it is precisely that reverse discrimination which the Fifth Circuit would have unions effect when it finds that Southern Conference and Local 657 violated Title VII by failing to direct "a one time-only transfer with (competitive-status) seniority carryover" for *all* ETMF's minority city drivers in Texas. (A. 99-101). It is precisely such reverse discrimination that the Fifth Circuit itself accomplishes when it orders as a remedy such transfer rights for all Texas minority city drivers. (A. 101-07).[28] Surely, labor organizations cannot be held to violate Title VII because they failed to insist upon reverse discrimination which that statute itself prohibits.

In sum, contract seniority rules, placed in issue by the Fifth Circuit, are not discriminatory either in their origin or upon their face. Taken with other contract rules, they make reasonable accommodation between

---

[28] In this respect the transfer and seniority portions of the remedy guidelines ordered by the Fifth Circuit in the instant case are identical to those from which petitioners seek relief in *International Brotherhood of Teamsters* v. *United States of America and T.I.M.E.-D.C., Inc. v. United States of America,* (No. 75-636 and 75-672 (Consolidated)).

a labor organization's twin obligations of (a) protecting against racial and ethnic discrimination in filling of road jobs and (b) protecting against reverse discrimination against incumbent road drivers, which would result from the indiscriminate award of competitive-status road seniority to minority employees solely upon the basis of race or national origin. If these contract seniority rules do not constitute a "bona fide seniority . . . system . . ." then there exists no such system. In that case, Section 703(h) of Title VII is meaningless verbiage. We respectfully request that the Court make plain that this is not so.

CONCLUSION

Southern Conference of Teamsters respectfully prays that the judgment of the Court of Appeals be reversed, and that the judgment of the trial court be reinstated insofar as it found that Southern Conference and Local 657 committed no violation of Title VII or Section 42 U.S.C. § 1981.

Respectfully submitted,

DAVID PREVIANT
211 W. Wisconsin Avenue
Milwaukee, Wisconsin 53203

MULLINAX, WELLS, MAUZY & BAAB, INC.
L. N. D. WELLS, JR.
G. WILLIAM BAAB
Suite 200—8204 Elmbrook Drive
Dallas, Texas 75247

Counsel for Petitioner,
Southern Conference of Teamsters

August, 1976